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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

FIRST NATIONAL BANK OF FAIRBANKS,
Petitioner,

v.

WILLIAM B. CAMP,
Comptroller of the Currency of The United States,

and

THE FIRST NATIONAL BANK OF ANCHORAGE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

First National Bank of Fairbanks prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. A-3-A-37)[1] is reported at F.2d . The opinion of the district court (App. B, *infra*, pp. B-1-B-9) is reported at 326 F. Supp. 541. The Comptroller rendered no opinions, by his letter of June 30, 1970, initially rejecting the application here involved is included herein as Appendix C (JA 48); and his letter of November 10, 1970, reversing himself is included as Appendix D, (JA 50).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1972 (App. A, A-3). A timely petition for rehearing and/or suggestion for rehearing *en banc* was denied on July 12, 1972 (App. A, pp. A-1, A-2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the congressional policy of competitive equality between national banks and state banks with its deference to state standards, which this Court declared in

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[1] "App." refers to the appendix to this petition. "JA" refers to the Joint Appendix filed in the court of appeals. "TR" refers to the transcript of the Comptroller's public hearing which is part of the record below.

Walker Bank[2] and in *Dickinson*[3] to be the basic policy underlying the National Bank Act as it pertains to branch banking, 12 U.S.C. Sec. 36(c), has been undermined and violated by the Comptroller of the Currency in authorizing The First National Bank of Anchorage to establish a branch in Fairbanks, Alaska, over the opposition of the State, in circumstances where

(a) consistent with the explicit language of the state statute the Alaska Director of Banking has declared that establishing a branch would be detrimental to a sound banking system in that Fairbanks is already overbanked and that he would not permit a state bank to open a branch in that city;

(b) consistent with the explicit language of the state statute the Alaska Director of Banking has declared that the "deceptively similar . . . or otherwise misleading" name prohibition of the Alaska Banking Code would preclude his office from approving an application involving names so similar as the First National Bank of Anchorage and the First National Bank of Fairbanks; and

(c) neither the Comptroller nor the court below has expressly held that the findings of the Alaska Director of Banking are in conflict or inconsistent with the state statute.

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[2] First National Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

[3] First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969).

2. Whether the failure of the Comptroller to issue any findings or opinions disclosing the grounds upon which he acted in approving the establishment of a branch in Fairbanks constituted a failure of administrative due process which the court below erroneously sought to repair by making findings for the Comptroller, contrary to this Court's *Chenery* rule.[4]

3. Whether the failure of the court below to give any consideration at all to petitioner's contention that the common law of trade names and unfair competition bars approval by the Comptroller of a branch in Fairbanks with a deceptively similar name, in itself warrants reversal of its judgment.

4. Whether the transcendant public interest in maintaining the inviolability of the congressional policy of competitive equality between national banks and state banks as it pertains to branching makes it essential that a writ of certiorari be granted to review the opinion below.

STATUTES INVOLVED

The National Bank Act as it pertains to branching is governed by the Act of February 27, 1927, 44 Stat. 1228, as amended, 12 U.S.C. Sec 36(c). In pertinent part Sec. 36(c) provides:

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[4] SEC v. Chenery Corp. 318 U.S. 80, 92 (1943), as recently reiterated in Federal Trade Commission v. The Sperry and Hutchinson Company, 405 U.S. 233, 249 (1972).

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question *by language specifically granting such authority affirmatively and not merely by implication or recognition*, and subject to the restrictions as to location imposed by the law of the State on State banks . . . . (Emphasis added)

Section 415 of the Alaska Banking Code, 6 Alaska Statutes Sec. 06.05.415 (1961) provides, in pertinent part:

> . . . The department shall issue a certificate of authority to operate a branch . . . if
>
> (1) the department determines that the addition of the proposed facilities in the community is not *detrimental to a sound banking system;*
>
> • • •
>
> (3) the name is not *deceptively similar* to that of another bank in the proposed community or *otherwise misleading;*
>
> • • • (Emphasis added)

STATEMENT

In authorizing the establishment by the First National Bank of Anchorage (FNB Anchorage) of a branch in Fairbanks, where the First National Bank of Fairbanks (FNB

Fairbanks) was chartered in 1905 and for the past 65 years has been "First National" in that community, we contend that the Comptroller has arbitrarily and unlawfully failed to meet the criteria established under the National Bank Act as it pertains to branching. The criteria are twofold – first, the statute law of the particular state must grant similar authorization to state banks by language specifically granting such authority and, second, restrictions governing the establishment of branch banks imposed by the law of the state must be strictly observed. The overwhelming weight of judicial authority as pronounced by this Court and other federal courts makes it evident that compliance with these criteria is an essential prerequisite to the establishment of national bank branches. This is in furtherance of the congressional policy of competitive equality between the national and state banking systems which is the underlying philosophy of 12 U.S.C. Sec. 36(c).

In the face of the well documented opposition of the State of Alaska,[5] which found the application repugnant under prohibitions in the State Banking Code against branching considered "detrimental to a sound banking system" and utilizing a "deceptively similar" name, the Comptroller first denied but four months later approved

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[5] The position of the state is documented by the testimony of the state banking director at the Comptroller's public hearing, by his letters to the Comptroller, and by his affidavit submitted on behalf of the state in this litigation below. That affidavit was also annexed as Appendix D to petitioner's application to the Chief Justice for a stay of the mandate of the court below pending review of this petition.

the establishment by FNB Anchorage of a branch in Fairbanks without writing an opinion or making any findings at all to indicate that compliance had been made with the statute law of the state. The court below plainly recognized this failure by observing (A-22):

> . . . In this case there is no specific finding anywhere in the record that the Comptroller found that the application complies with the Alaska Banking Code. (footnote omitted)

but then continued:

> In the face of this failure to make an express finding that the application complies with the most basic requirement of Section 36(c) and the Supreme Court's *Walker Bank* and *Dickinson* decisions, we have been extremely careful in scrutinizing the administrative record here for evidence that the Alaska Banking Code's requirements have been met . . . .

The court thereupon sought to articulate what it thought the Comptroller inferentially had found. This exercise was contrary to the course this Court has adopted in the past, most recently in *Federal Trade Commission v. The Sperry and Hutchinson Company*, which reiterated the *Chenery* holding that

> "[t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed . . ."[6]

---

[6] SEC v. Chenery Corp. 318 U.S. 80, 94 (1943), and Burlington Truck Lines v. United States, 371 U.S. 156, 169 (1962), as cited in *Sperry*, 405 U.S. 233, 249 (1972). It also conflicts with the

(continued)

Having undertaken to make its own findings, however, the court below erroneously concerned itself more with whether there was substantial evidence to support the Comptroller, who never did look to the law of the state,[7] than with whether the State Director's findings were consistent with the state standards. In the course of this exercise the Congressional policy of competitive equality between national and state banks was improperly applied to mean such equality between national banks alone.

The case commenced when FNB Anchorage applied to the Comptroller of the Currency on September 17, 1969, for permission to establish a branch office in the downtown business district of Fairbanks, claiming that the great oil activity on the North Slope made the branch necessary so that FNB Anchorage "could follow the development of its customers." The application was opposed by the State of Alaska Division of Banking and Securities, by several Fairbanks banks, including FNB Fairbanks, and by the Alaska Association of State Chartered Banks. The Comptroller held a public hearing before a three member panel of his office at which the protestants, including the State Banking Director and FNB Fairbanks, testified at great length in opposition, submitting to unlimited cross-examination at the

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[6] (continued) course utilized by the Fourth Circuit in Pitts et al v. Camp, ___ F.2d ___ (No. 71-1965, June 28, 1972), which while involving a charter application rather than a branch application, contained one of the same vices here, namely, no basis for decision was stated. The court there said: ". . . Since the Comptroller has twice inadequately and inarticulately resolved the appellant's presentation, we remand the cause for a trial de novo before the District Court rather than to the Comptroller for further consideration."

[7] The Comptroller's administrative file totalling 454 pages fails to disclose any reference to or consideration of the specific provisions of the Alaska Banking Code here involved.

hands of counsel for FNB Anchorage. On the other hand, the President of FNB Anchorage, although present at the hearing, did not testify in support of his application nor submit to cross-examination.[8] The veracity of statements in the application which were critical in determining on the merits whether or not a branch bank in Fairbanks was warranted were thus not tested in open hearing, leaving a doubtful record in this regard, upon which the court below nevertheless relied in seeking to find the Comptroller's rationale for reversing himself.

State Banking Director John K. Robertson, in testifying on behalf of the state[9] that the addition of the branch to the existing banking facilities in Fairbanks would be "detrimental to a sound banking system" and thus in contravention of the state statute stated (Tr. 62):

> Now, in Fairbanks, as we have indicated in our written statements, *there are already too many banks for the size of the city*. The largest bank in the state has just opened a branch there. Now the second largest bank wants two more branches. I feel very strongly that these proposed new branches would seriously *jeopardize all existing banks in Fairbanks and make it exceedingly difficult for them to complete there and elsewhere*. For these reasons I strongly urge you to deny the airport application as well as the downtown application. (Emphasis added)

[8] The opinion below (A-7) states categorically that "*no* request was made by any of the participants to examine or otherwise hear testimony" from the President of FNB Anchorage Most respectfully, we submit that the transcript of hearing (Tr. 48-49, attached hereto as Appendix E) established that such a request was made and declined with the approval of the presiding panel member.

[9] At the commencement of his lengthy testimony State Banking Director Robertson expressly stated that "[Then] Governor Miller has asked me and my bank examiner to appear here and express the position of the state" (Tr. 50-A).

Later, on redirect examination, Mr. Robertson made it clear that if a state bank applied for a branch in Fairbanks it would be denied (Tr. 85):

> Q. If on this date or at the time the First National Bank of Anchorage filed its application for Fairbanks, a state chartered bank, one of the banks in your system, were to file an application for a branch operation in the city of Fairbanks, would you grant it or deny it and if so, why?
>
> A. Mr. Work, we would deny it because we believe Fairbanks is overbanked.

Also appearing on behalf of the state at the Comptroller's public hearing, a state banking examiner, Monte B. Cady, testified as follows (Tr. 92):

> "... This concentration of nine banks in roughly an eight-block area in a city which best estimate gives us as 19,000 is a tremendous concentration in banking circles. Roughly this gives us 2,111 people per banking office which is very low to try and support banks.
>
> "With the admission of the First National Bank of Anchorage, assuming that the population does not change drastically, it will obviously drop to 1,900 people per branch office. *We are rapidly reaching limits where no one can survive under those conditions.*" (Emphasis added)

Following the hearing and after considering the recommendations of the three member panel as well as top members of his Washington, D.C., staff, the Comptroller by letter

of June 30, 1970 (App. C, *infra*), advised FNB Anchorage that its application was denied "[a]fter carefully reviewing and thoroughly studying all the material assembled and information developed relevant to the proposed branch . . ."

Some two months later FNB Anchorage in a one page letter to the Comptroller's office requested reconsideration of the original application without alleging new grounds or changed circumstances. State Banking Director Robertson and FNB Fairbanks, among others, filed protests opposing reconsideration because of further deterioration in the economic prospects for the Fairbanks area. Robertson's submission explained the slowness in real economic growth; the high unemployment factors and increasing trend in the poverty level of the community; the increasing concentration of banking assets in the two largest banks in the state, and the potentially harmful effects thereof. The statement warned against speculation on the timing of the initiation of construction on the proposed pipeline[10] and again reiterated that there were more than enough banks in Fairbanks to meet present needs. With regard to the second qualification of the state statute on branching, that the name of the bank not be "deceptively similar . . . or otherwise misleading" the State Director underscored the evident confusion in the names by advising the Comptroller categorically that the state office would be precluded from approving an application involving names so similar as the First National Bank of Anchorage and the First National Bank of Fairbanks.

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[10] Action on the pipeline was then under injunction by the District Court for the District of Columbia in Wilderness Society v. Hickel, 325 F. Supp. 422 (1970). Although the injunction was recently lifted, the case is now in the court of appeals, and pipeline interests will not build until the litigation is ultimately concluded.

In the interim, a new Regional Comptroller was assigned[11] and on his favorable recommendation top members of the Comptroller's Washington staff, who had split previously in denying the application, voted approval. The Comptroller's letter of November 10, 1970 (App. D, *infra*,) approving the application contained not a single word in explanation or in justification of his reversal of his earlier action denying the application.[12] This abrupt and unexplained reversal, accomplished without any apparent change in circumstances to justify it, violated all accepted principles of administrative due process and provided no basis whatsoever for informed review by any court.

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[11] H. Joe Selby was the successor to former Regional Comptroller Kenneth W. Leaf who, as one of the three member panel, voted with a second member to deny the application.

[12] The Comptroller's failure to do so flies in the face of the lofty standards pronounced in a published article by his Chief Counsel in 1966 to the effect that "the Comptroller now generally accompanies his decisions on contested applications with opinions that summarize the factors on which he relied in reaching his conclusion." Bloom, *Hearing Procedures of the Office of Comptroller of the Currency*, 31 *Law & Contemporary Problems* 723 (1966). A pertinent discussion of this serious defect in the Comptroller's practice appears in Citizens Natl Bank of Southern Maryland v. Camp, 317 F. Supp. 1389, 1392 (D. Md. 1970).

REASONS FOR GRANTING THE WRIT

I.

THE RESULT BELOW COLLIDES WITH THIS COURT'S TEACHING IN *WALKER BANK* AND *DICKINSON* THAT THE CONGRESSIONAL POLICY OF COMPETITIVE EQUALITY REQUIRES DEFERENCE TO STATE STANDARDS.

A. The failure to give deference to state standards.

In approving the action of the Comptroller, the court below failed to accord deference to Alaska's standards under the doctrine of competitive equality which this Court has declared to be the underlying philosophy of the National Bank Act, 12 U.S.C. Sec., 36(c), as it pertains to branching.

By virtue of *Walker Bank*,[13] affirming both the Tenth and D. C. Circuits,[14] and *Dickinson*,[15] affirming the Fifth Circuit,[16] it is now settled law that the measuring stick of national bank branching is state law,[17] that a national

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[13] First National Bank of Logan, Utah v. Walker Bank and Trust Company, 385 U.S. 252 (1966).

[14] Walker Bank & Trust Co. v. Saxon, 353 F.2d 90 (10th Cir. 1965); Commercial Security Bank v. Saxon, 236 F. Supp. 457 (D.D.C.), affirmed by the D. C. Circuit without opinion, citing the Tenth Circuit's decision with approval; and *aff'd sub. nom.*, First National Bank of Logan, Utah, v. Walker Bank and Trust Co., *id.*

[15] First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969).

[16] Dickinson v. First National Bank in Plant City, Florida, 400 F.2d 548 (1969).

[17] *Walker Bank*, Tenth Circuit, at 92.

bank branch may be established only when, where and how state law authorizes a state bank to establish and operate a branch;[18] that state law will in each instance determine whether to permit a national bank to branch, and that in this area of the law Congress has restricted its own power and acceded to state law;[19] that it is clear from the legislative history of 12 U.S.C. Sec. 36(c) that Congress intended to place national and state banks on a basis of competitive equality insofar as branch banking was concerned;[20] that it is the intent of the Congress to leave the question of desirability of branch banking up to the states;[21] and finally, that where under state law a state bank is not authorized to branch, then neither is a national bank authorized to branch. As this Court noted in *Dickinson* (at 130):

> . . . The parties agree generally that the McFadden Act permits national banks to branch *if and only if* the host State would permit one of its own banks to branch . . . . (Emphasis added)[22]

Thus, it is now well settled that the Comptroller of the Currency may authorize a national bank to establish a branch in downtown Fairbanks only under the very same

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18 *Dickinson*, 396 U.S. 122, at 130.

19 *Walker Bank*, Tenth Circuit, at 94.

20 *Walker Bank*, 385 U.S. 252, at 261; *Dickinson*, 396 U.S. at 130-133.

21 *Walker Bank Id.* at 258; *Dickinson* at 133.

22 To the same effect see *Walker Bank* at 260; Jackson v. First National Bank of Valdosta, 349 F.2d 71, 72 (5th Cir. 1965); National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537, 540 (6th Cir. 1958); Commercial Security Bank v. Saxon, 236 F. Supp. 457, 461 (D.D.C. 1964).

conditions and restrictions that Alaska law permits a state bank to establish and operate a branch. The Alaska standards (*supra*, p. 5) required to be met as a prerequisite to the issuance of a certificate to operate a branch bank are:

> (1) the department determines that the addition of the proposed facilities in the community is not *detrimental to a sound banking system;*
>
> * * *
>
> (3) the name is *not deceptively similar* to that of another bank in the proposed community *or otherwise misleading;*
>
> * * * (Emphasis added)

Viewing these standards in the light of the FNB Anchorage application, the State, acting through its Director of Banking, categorically stated that under state law it must deny a state bank the right to branch in Fairbanks because the City was over-banked and that establishing another bank would seriously jeopardize all existing banks in Fairbanks, making it exceedingly difficult for them to compete there and elsewhere. It was manifest from the Director's submissions that these results, jointly and severally, would be "detrimental to a sound banking system" in violation of state law.[23]

---

[23] The Fourth Circuit has recently reiterated its holding that comparable state standards are binding on the Comptroller. In First National Bank of Catawba County v. Wachovia Bank and Trust Co., and William B. Camp, Controller of the Currency, 448 F.2637 (1971) the court held *per curiam* (at 638):

> We reaffirm our holding in *First-Citizens.* See, as additional support, First National Bank in Plant City v. Dickinson, 396 U.S. 122, 130, 131 (1969). And we reiterate that the Comptroller "was bound by North Carolina's 'need and convenience' and 'solvency of the branch' criteria" . . .

The Director also stated categorically that the "deceptively similar . . . or otherwise misleading" name prohibition of the Alaska Banking Code would preclude his office from approving an application involving names so similar as the First National Bank of Anchorage and the First National Bank of Fairbanks (JA 149-150).

As a consequence of the National Bank Act and this Court's holdings in *Walker Bank* and *Dickinson* just reviewed above, the Comptroller should plainly have looked first to whether there were state statutory standards and whether Director Robertson's findings were consistent therewith. To the contrary, however, the record shows that throughout the review of the FNB Anchorage application, the Comptroller gave no consideration whatever to the standards of the Alaska statute.[24] As the court below very properly observed (at A-22), there was no finding anywhere in the record that the Comptroller found compliance with the Alaska Banking Code, and concluded that this constituted a ". . . failure to make an express finding

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[24] It is noteworthy that a formal report of investigation was made by the Comptroller's representative after FNB Anchorage filed its branch application, on a Comptroller's form which included the following question and answer:

> 3. Under the branch banking laws of the State, may the applying bank legally establish a branch at the location proposed? (If there is any question as to legality an opinion of the bank's counsel should be obtained.)
>
> Answer:
>
> There are reportedly no state laws that limit branch banking. (JA 137).

This clearly erroneous answer in itself shows the inattention of the Comptroller's office to state standards.

that the application complies with the most basic requirement of Section 36(c) and [this] Court's *Walker Bank* and *Dickinson* decisions . . ." Surely this finding by itself should have been sufficient to reverse the district court.

B. The findings of the State Banking Director are not in conflict or inconsistent with the Alaska statute and should have been followed.

Nowhere in the opinion below does the court expressly hold that Banking Director Robertson's findings were in conflict or inconsistent with the state statutory standards. Rather, it is apparent that the court below applied a test which is contrary to the congressional policy of competitive equality with its deference to state standards. This is summed up in its opinion as follows (at A-31):

> It is apparent from the foregoing that Mr. Robertson and the Comptroller's office differ in their interpretation of what constitutes a "sound banking system" in Alaska. We find, however, that the *interpretation expressed by the Comptroller's office more nearly comports* with the legislative intent expressed in Section 36(c) and the Alaska statute . . . . (Emphasis added)

Putting to one side the fact that the Comptroller never really took the Alaska statute into account and thus could not have interpreted it, manifestly the test is not whether "the interpretation expressed by the Comptroller's office more nearly comports with the legislative intent expressed in Section 36(c) and the Alaska statute." The correct test under the congressional policy of competitive equality

with its deference to state standards is whether the state banking director's findings were consistent with the state statutory standards. There was certainly a full record on the State Director's position, through his formal submissions to the Comptroller, his oral direct testimony, his testimony on cross examination and his affidavit, on which this determination could be made. This is in sharp contrast to the FNB Anchorage application which remained unsupported at the hearing with no cross examination permitted and which was first rejected by the Comptroller and later embraced by him without making any findings or giving any reasons at all.

As we have noted, the State Director's position was that Fairbanks was already overbanked, with clearly too many banking offices for the population. When FNB Anchorage asked for reconsideration of the initial rejection, the State Director pointed out that economic conditions in Fairbanks had worsened even further because of the decline in North Slope oil activity. Furthermore, he made specific reference to the provision of the Alaska Banking Code inveighing against deceptive similarity in name and declared that this would preclude his office from approving an application involving names so similar as the two First Nationals in this case. There can be no question that his actions were totally consistent with the policy of the state statute. Indeed, this evidence makes plain the arbitrary and capricious nature of the Comptroller's reversal of himself.

As the findings of the State Director were clearly consistent with the statutory law they should have been followed. This would have been in accord with the Fifth Circuit's holding in *Dickinson* as follows (at 557-58):

> . . . The Comptroller of the State of Florida, however, in his letter to the First National dated September 28, 1966, specifically ruled that "these two activities are in violation of Section 659.06(1)(a), Florida Statutes." *Such a ruling may sometimes constitute the only "law"* of the state, cf. United States v. Howard, 1957, 352 U.S. 212, 77 S. Ct. 303, 1 L. Ed. 2d 261, and *we should follow it when, as here, it appears consistent with the policy of the state statute.* See Jackson v. First National Bank of Valdosta, supra. 349 F.2d at 73. (Emphasis added; footnote omitted.)

and in conformity with this Court's holding affirming the Fifth Circuit as follows (at 138):

> Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks. The utility of the armored car service and deposit receptacle are obvious; many States permit state chartered banks to use this eminently sensible mode of operations, but *Florida's policy is not open to judicial review any more than is the congressional policy of "competitive equality."* Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency. (Emphasis added; footnote omitted)

In adopting "a more restrictive view of the *Dickinson* language than that urged upon us by appellant" (at A-15),

we respectfully submit that the court below erred in failing to apply the congressional policy of competitive equality with its deference to state standards to the factual situation here. *Walker Bank* at 258; *Dickinson* at 133.

II.

THE FAILURE OF THE COMPTROLLER TO MAKE ANY FINDING OR GIVE ANY REASONS CONSTITUTED A FAILURE OF ADMINISTRATIVE DUE PROCESS WHICH THE COURT BELOW, *CONTRA* THIS COURT'S *CHENERY* RULE, ERRONEOUSLY SOUGHT TO REPAIR.

As we have noted (pp. 7, 17, *supra*) the court below stated forthrightly that there was no specific finding anywhere in the record that the Comptroller found that FNB Anchorage's application complied with the Alaska Banking Code and that this was a failure of compliance with the most basic requirement of 12 U.S.C. Sec. 36(c) and this Court's *Walker Bank* and *Dickinson* decisions. Such a finding and a supporting opinion should have been insisted upon as a minimum to judicial review. Instead the court undertook to make its own findings for the Comptroller (A-22).

The course thus taken below was contrary to generally accepted principles of administrative procedure and judicial review recently restated by this Court in *FTC v. Sperry and Hutchinson Company, supra.* There this court reasserted its holding in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) that "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

This fundamental principle from *Sperry* was underscored by the Fourth Circuit in rejecting another failure by the Comptroller to render an opinion, this time in connection with an application for a bank charter, in *F. W. Pitts et al v. Camp.*[25] The application there was rejected initially, without hearing, and again on reconsideration, in two separate letters from the Comptroller to the applicant's attorney. Suit was brought charging *inter alia* that the Comptroller's action was arbitrary, capricious and wholly without supporting proof. Vacating the judgment of the District Court favorable to the Comptroller, the Fourth Circuit said (slip opinion p. 4):

> It is unnecessary, we think, to discuss the separate assignments of error ascribed by the appellants to the District Court. This is because in itself the ruling of the Comptroller is unacceptable. *It does not comply with the bare, fundamental principle of agency decision that its basis must be stated. FTC v. Sperry & Hutchinson Co.*, 40 USLW 4241, (March 1, 1972). *Sperry* reiterated the precept of *SEC v. Chenery Corp.*, 318 US 80, 94 (1943), that "[t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed . . ." 40 USLW at 4246. Indeed, the review of the agency action, and relief from any error therein, assured by sections 10(a), (b), and (e) of the Administrative Procedure Act, 5 USC 702, 703, and 706(2),

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25 ___ F.2d ___, No. 71-1965, decided June 28, 1972.

> would be impossible without a statement of such grounds. That the judicial review provisions of the Act apply to the Comptroller is unmistakenly written *Data Processing Service v. Camp*, 397 US 150, 156-57 (1970). (Emphasis added)[26]

The D.C. Circuit has not permitted such an imposition on it in other situations, for example in *Environmental Defense Fund v. Ruckelshaus* where the court said concerning judicial review that ". . . courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible."[27] And in an opinion just announced in a case in which the Comptroller is a party, the D.C. District Court said it "was not going to guess at those reasons which may have governed the Comptroller's approval" and held that due process required findings of fact to support a decision after a hearing. The court said "no such findings were made in this case, hence, the approval of the Comptroller was made unlawfully and is without legal effect."[27a]

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[26] It should be noted here that the court below (see A-18) takes a completely opposite and we submit mistaken view of the scope of judicial review.

[27] 439 F.2d 584, 598 (D.C. Cir. 1971) footnotes omitted. See also Judge Robb's recent opinion in USV Pharmaceutical Corp. v. Secretary of HEW and Commissioner of Food and Drugs, ____ F.2d ____, No. 24,900, decided August 14, 1972 (slip opinion p. 13):

> . . . As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence . . . (citations omitted).

[27a] Richey, J. in Wood County Bank v. Camp et al, D.C.D.C. No. 1277-72, decided October 3, 1972 (slip opinion pp. 12, 6).

Similarly, the Comptroller's cavalier approach to the standards of administrative due process has not been tolerated in other jurisdictions,[28] has been inveighed against by the experts,[29] and in similar situations, as in *Sperry*, rejected by this Court.[30] It should not be tolerated here.

III.

THE COURT BELOW ERRONEOUSLY IGNORED PETITIONER'S CONTENTION THAT THE COMMON LAW OF TRADE NAMES AND UNFAIR COMPETITION BARS THE ESTABLISHMENT OF A BRANCH IN FAIRBANKS WITH A DECEPTIVELY SIMILAR NAME.

FNB Fairbanks is the oldest national bank in the State of Alaska. It was established in 1905 in Fairbanks and has served the city continuously since then. To the residents of Fairbanks "First National" for 65 years has meant FNB Fairbanks and no other bank. Under well established legal and equitable principles protecting against unfair competition the words "First National" in the Fairbanks area

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[28] E.g. First National Bank of Catawba County v. Wachovia Bank and Trust Company and William B. Camp, Comptroller of the Currency, 448 F.2d 637 (1971). In Citizens National Bank of Southern Maryland v. Camp, 317 F. Supp. 1389, (D.Md. 1970), the court stated (at 1394):

> The Court does not hold that the Comptroller must make a finding or conclusion in the precise words of the statute . . . The Comptroller must, however, indicate that he has considered the applicable law and based his conclusion thereon.

[29] Davis, *Discretionary Justice* (1969). Davis, *Administrative Procedure in the Regulation of Banking*, 31 *Law & Contemporary Problems* 713 (1966); Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 *Law & Contemporary Problems* 723 (1966).

[30] E.g. Securities & Exch. Comm'n v. Chenery Corp., 318 U.S. 80 (1942); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1934); Atchison, T. & S.F.R. Co. v. United States, 295 U.S. 193 (1934).

must be deemed preempted by FNB Fairbanks by virtue of long usage alone to the exclusion of all others who seek to enter this area with a deceptively similar name.

We have already reviewed our contention that FNB Anchorage should not be permitted to establish a branch in Fairbanks using the words "First National" because the use of a deceptive or misleading name is specifically barred by the Alaska Banking Code. Suffice it to say here that the Comptroller was under legal constraint to consider and observe this restriction in the state statute in the same manner as he was required to observe the "sound banking system" restriction of the state statute as it pertains to branch banking. But his approval of the FNB Anchorage application to establish a branch with the name "The First National Bank of Anchorage – Interior City Branch" also violates the principle behind the Alaska statute, namely that the common law of trade names and unfair competition similarly bars the use of "First National" by FNB Anchorage in Fairbanks. It is to this contention which was raised but ignored below that we now turn.

Trade names protection finds its genesis in the common law. The twin touchstones of the law of unfair competition are the protection of the consumer from confusion resulting from deceptive and misleading names and the preservation of an individual's trade identity.[31] Under legal and equitable principles protecting against unfair competition in the use of deceptively similar names, the overwhelming weight of judicial authority supports the proposition that FNB Anchorage, even assuming *arguendo* a

[31] Communications Satellite Corp. v. Comcet, Inc., 429 F.2d 1245, 1249, 1250 (4th Cir. 1970); Polaroid Corporation v. Polaroid, Inc., 319 F.2d 830, 833, 836 (7th Cir. 1963); American Steel Foundaries v. Robertson, 269 U.S. 372, 380 (1926).

branch were to be authorized, should be enjoined from using the words "First National" in the Fairbanks area to which FNB Fairbanks has first and exclusive use by virtue of its 65 years of usage. This is abundantly clear from *General Finance Loan Co. v. General Loan Co.*, 163 F.2d 709, 712 (8th Cir.), *certiorari denied*, 332 U.S. 851 (1947), which involved an appeal from a judgment and decree permanently enjoining defendants from using the word "General" or any name identical with or similar to or in imitation thereof in the conduct of their businesses. All the parties were in the loan business and the judgment was predicated upon a finding of unfair competition in the defendants' use of the word "General" in their corporate names. Upholding the District Court, the Eighth Circuit stated (at 712):

> . . . The ultimate question is not, therefore, whether the evidence shows actual confusion but whether confusion is likely to result in the use of similar corporate names of parties engaged in kindred businesses in the same territory, or whether the names of the defendants are so distinguished from that of the plaintiff as to prevent any probable confusion. . . . The question of confusion is one of fact, but it is not incumbent upon the plaintiff to allege and prove actual confusion or deception, but only such similarity of names with other facts and circumstances as to show that confusion may result.
>
> * * *
>
> Even though the word "general" should be regarded as a descriptive word it may acquire a secondary meaning when used as a part of the

> name of a business so as to sustain an injunction against its use in the same capacity by a later competitor in the same territory. . . .[32]

We also note *U.S. v. First National Bank of Maryland* (fn. 32 *supra*) because it involved the identical name similarity as in the case at bar. In deciding an anti-trust suit there brought by the government to enjoin the merger of the First National Bank of Maryland and the First National Bank of Harford County, the court's discussion included this significant observation (at 185):

> . . . First of Maryland would be buying name litigation from First of Harford if it entered into the latter's territory without changing its name. . . . And case law shows that a bank, like any other type of corporation, is *entitled to enjoin*

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[32] See to the same effect Metropolitan Life Insurance Co. v. Metropolitan Insurance Co., 277 F.2d 896 (7th Cir. 1960), sustaining an injunction against the defendant from using the word "Metropolitan" or any name deceptively similar, where the Seventh Circuit said (at 900):

> It is well established . . . that injunctive relief is properly granted in cases involving the use of deceptively similar names even though there is no proof of actual confusion. It is sufficient to show the likelihood that confusion will result and that the public might be misled.

See also Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2d Cir. 1962); United States v. First Nat'l Bank of Maryland, 310 F.Supp. 157 (D. Md. 1970); Fund of Funds, Limited v. First American Fund of Funds, 274 F.Supp. 517 (S.D.N.Y. 1967); First National Bank & Trust Company of Kalamazoo v. First National Credit Bureau Inc., 364 Mich. 521, 111 N.W. 2d 880 (1961); Middletown Trust Co. v. Middletown Nat'l Bank, 110 Conn. 13, 147 A.22 (1929).

> the use of a newcomer of a name confusingly similar to its own. While *changes in the use of* and *emphasis placed* upon words in a name can often alleviate confusion, it is *hard to believe* that any such changes *could remove the cloud of name usage litigation* if First of Maryland were to move into the area of First of Harford under a name which includes "First National." (Emphasis added; footnotes omitted)[33]

We respectfully submit that the court below erred in failing to give consideration to our contention that on the basis of the common law of trade names and unfair competition FNB Anchorage should be barred from using the name "First National" in the Fairbanks area. The judgment below should be reversed on this ground alone.

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[33] The identical name situation was also presented in *First National Bank & Trust Company of Kalamazoo*, fn. 32, *supra*, where the Supreme Court of Michigan quoted with approval the court below as follows (at 882):

> "It is the conclusion of this court that the words "First National" *dominate* the names of both plaintiff and defendant. They are the words that *attract* the eye of the reader. They are the words that by reason of the manner in which the plaintiff has emphasized them over and above the other words in its name, through its many advertising media, over many years, has built in the *mind of the average person* of this area the *image of the plaintiff* upon such person seeing the words "First National". [Emphasis added]

IV.

THE PUBLIC INTEREST REQUIRES THAT THE INVIOLABILITY OF THE DOCTRINE OF COMPETITIVE EQUALITY BETWEEN NATIONAL BANKS AND STATE BANKS WITH RESPECT TO BRANCHING BE MAINTAINED.

The legislative history of the Congressional policy of competitive equality received most careful review by this Court in affirming the *Walker Bank* cases below. There the Tenth Circuit had made it clear that Congress did not intend to give national banks a competitive advantage over state banks (at 94):

> . . . It is clear to us that the Congress intended to create and maintain a competitive equality *between state and national banks.* The trial court's *interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage.* (Emphasis added).

The D.C. Circuit noted this opinion with approval in its per curiam affirmance of *Commercial Security Bank v. Saxon, supra,* where the same Congressional policy was voiced as follows (at 461):

> . . . If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, *the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks.* (Emphasis added).

It was because of this policy to avoid giving national banks a competitive advantage that Congress acceded to state law. As the court below put it (A-12-A-13) there was a ". . . totality of . . . national deference to state law", and this of course was to achieve competitive equality between the federal and state systems. Despite this recognition that deference to state standards was required, the court below appears to have abandoned the principle of competitive equality *between national and state banks* in this case in favor of competitive equality *between national banks*. Thus, in upholding the Comptroller's approval of the FNB Anchorage application and in seeking to explain his rationale for doing so, the court below stated *inter alia* (A-28):

> . . . However, having previously authorized a branch of the National Bank of Alaska – the larger of the two – in Fairbanks, one factor weithing heavily in favor of granting this application was to provide FNB Anchorage the opprotunity to continue its head-to-head statewide competition in the Fairbanks area.[21] . .

Footnote [21] Prior disapproval by the Comptroller of FNB Anchorage branch applications at Kenai (1967) and Fairbanks (1965, 1970), which National Bank of Alaska was successful in having branch applications approved at both locations (AF 17-18), may have indicated a prior prejudice or favoritism that the Comptroller sought to correct. Since 1960 the National Bank of Alaska has had 13 branch applications approved by the Comptroller and one disapproved; FNB Anchorage has had 4 approved and 4 disapproved (AF 17, 19, 20).

We submit that this emphasis on competition between two national banks by the court below is totally at odds with the Congressional policy of competitive equality between national and state banks.

Militating against any such posture are the "public interest" and "public policy" factors. It is, of course, the responsibility of the State of Alaska to keep the banking system sound and healthy. The State Banking Director declared that Fairbanks was "overbanked" and that establishment of a branch there would seriously jeopardize all existing banks in Fairbanks and make it exceedingly difficult for them to compete there and elsewhere.[34] A state bank examiner testified at the Comptroller's public hearing that if FNB Anchorage entered downtown Fairbanks the number of people per branch office would drop from approximately 2,111 to 1,900 persons, and then stated, "We are rapidly reaching limits where no one can survive under those conditions."[35] At the same hearing Banking Director Robertson stated categorically that in these circumstances he would not permit a state bank to branch. Thus, to permit FNB Anchorage, the second largest bank in Alaska, to enter the Fairbanks area by establishing a branch at a critical period when the economy is at a low ebb and unemployment is high could well impair the viability of all existing banks in Fairbanks, national and state. This is clearly not in the public interest.

It appears that in emphasizing the desire of the Comptroller to equalize branching facilities between FNB Anchorage and the National Bank of Alaska, the Court below

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[34] Tr. 62; *supra*, at 9.

[35] Tr. 92; *supra*, at 10.

regarded this factor as more important than maintaining the congressional policy of competitive equality between national banks and state banks. In this connection, we think it noteworthy that in applying for reconsideration, after first being denied, FNB Anchorage emphasized the view that it should be given the same opportunity as the National Bank of Alaska. This, of course, was not new to the Comptroller nor was there anything else in the one page letter request for reconsideration which was new information not already before the Comptroller when he rejected the application. Indeed, the only new information before the Comptroller on reconsideration was the documented submission by the state showing economic conditions in Fairbanks had worsened. It is thus quite apparent that in reversing himself the Comptroller sought to purge what the court below thought might have indicated his "prior prejudice or favoritism" to another national bank. In approving this, which is clearly not within the congressional purpose of competitive equality between national and state banks, the court below was plainly in error.

It should also be observed here that this "head-to-head statewide competition" between two national banks, given below as a reason for approving this application, lays bare the vice in the name similarity which the state statute inveighs against. Manifestly, as a practical matter it will be impossible for FNB Anchorage to compete effectively with National Bank of Alaska statewide without stressing in every manner possible and as widely as possible that it is indeed "First National" in Fairbanks.[36] This sort of activity would appear to be absolutely essential on the part

[36] This situation is clearly shown in the advertisement by FNB Anchorage shown in Appendix F.

of FNB Anchorage if it is to be in competition with National Bank of Alaska on the basis which the Comptroller apparently desires. This plainly has no relation whatever to competitive equality between national and state banks and is in derogation of deference to state standards.

CONCLUSION

This petition for a writ of certiorari should be granted and because of the reasons stated, including the conflict with this Court's holdings in *Walker Bank* and *Dickinson*, the decision below should be summarily reversed.

Respectfully submitted,

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Attorneys for Petitioner

October 6, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1367 **September Term, 1971**

First National Bank of Fairbanks
Appellant

v.

William B. Camp, Comptroller of the Currency of the United States, et al

Civil Action 3702-70

Filed July 12, 1972

Before: McGowan and MacKinnon, Circuit Judges and Gourley*, Senior District Judge for the Western District of Pennsylvania.

O R D E R

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Nathan J. Paulson

NATHAN J. PAULSON
Clerk

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

NATHAN J. PAULSON
CLERK

July 12, 1972

No. 71-1367 - *First National Bank of Fairbanks v. B. Camp*

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Gentlemen:

Enclosed is a copy of the Court's order denying your petition for rehearing.

You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*.

Yours very truly,

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

NJP/bjg
cc: John A. Terry, Asst. U.S. Attorney
John D. Hawke, Jr., Esq.
Michael H. Stein, Esq.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1367

FIRST NATIONAL BANK OF FAIRBANKS, APPELLANT

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, et al.

Appeal from the United States District Court for the District of Columbia

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Decided June 7, 1972

Mr. Max Barash for appellant. *Mr. Robert L. McCarty* also entered an appearance for appellant.

Mr. Michael H. Stein, Attorney, Department of Justice, with whom *Mr. L. Patrick Gray, III,* Assistant Attorney General, *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, and *Walter H. Fleischer,* Attorney, Department of Justice, were on the brief, for appellee Camp. *Messrs. John A. Terry, James F. Rutherford,* Assistant United States Attorneys, *Morton Hollander, Ronald R. Glancz,* Attorneys, Department of Jus-

tice, and *John V. Austin*, Attorney, Office of the Comptroller of the Currency, also entered appearances for appellee Camp.

Mr. John D. Hawke, Jr., with whom *Mr. Irvin B. Nathan* was on the brief, for appellee First National Bank of Anchorage.

Before McGowan and MacKinnon, *Circuit Judges*, and Gourley,* *Senior District Judge* for the Western District of Pennsylvania.

MacKinnon, *Circuit Judge*: In this suit the First National Bank of Fairbanks (FNB Fairbanks) seeks reversal of a decision of the Comptroller of the Currency (Comptroller) authorizing the First National Bank of Anchorage (FNB Anchorage) to establish a branch office in Fairbanks, Alaska. The case was submitted to the District Court on cross-motions for summary judgment, and the motions of the defendant Comptroller and intervenor FNB Anchorage were granted. We affirm the judgment of the District Court.

I. Background and Facts

FNB Anchorage applied to the Comptroller on September 17, 1969 for permission to establish a branch office in the downtown business district of Fairbanks, Alaska. Various supporting data accompanied the application. FNB Anchorage summarized its reasons for applying for the branch as follows:

> It is mandatory for this bank to follow the development of its customers in the ever-expanding economy of Alaska, greatly magnified as a result of the great oil activity on the North Slope. In order to do this, this branch must be established.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

JA 16.[1] All interested parties were notified of the application and invited to comment; a field investigation was made by a national bank examiner, who recommended approval of the application. Eventually the application was opposed by the State of Alaska, Division of Banking and Securities, by several Fairbanks banks and by the Alaska Association of State Chartered Banks (the Association). The Association and the Alaska State Bank requested the Comptroller to conduct a hearing on the application in order to have "a full opportunity to elaborate upon the reasons for their opposition."[2] JA 107. This request was granted, and the

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[1] The notation "JA" is used herein to refer to the Joint Appendix to the parties' briefs submitted on this appeal; "Tr." refers to the transcript of the March 31, 1970 public hearing on the application, and "AF" refers to the Comptroller's administrative file on the application.

[2] The Comptroller's discretion concerning the grant of such a request is broad; 12 C.F.R. § 4.12(d), in effect at the time of subject application, provided that:

> the Comptroller of the Currency, in his sole discretion, may, upon request of any interested person or otherwise, order a hearing, either public or private. Such hearing shall be held at the time and place fixed by the Comptroller and shall be conducted by the Comptroller or such other person as he may designate. . . . *A hearing ordered by the Comptroller is not required by statute . . . . Nothing contained herein shall be deemed to require the holding of a hearing by the Comptroller on any matter.* The validity of the Comptroller's determination in any matter shall not be affected because a hearing was not held, whether or not such a hearing was requested by any person . . . . (Emphasis added.)

The discretionary nature of the Comptroller's hearings has received substantial judicial approval. *See, e.g.*, Sterling Nat'l Bank of Davie v. Camp, 431 F.2d 514, 516-17 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971) (charter application); Ramapo Bank v. Camp, 425 F.2d 333, 347-48 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970) (branch application); First-

parties were notified of the date set for the hearing and were furnished a memorandum of procedures to be followed during the hearing.[3]

The hearing was held in Portland, Oregon, on March 31, 1970 before the Regional Comptroller, a Regional Econo-

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Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086, 1089-90 (4th Cir. 1969) (branch application); Warren Bank v. Camp, 396 F.2d 52 (6th Cir. 1968) (charter application); Citizens Bank of Hattiesburg v. Camp, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968) (charter application); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 384-85 (8th Cir. 1966) (charter application); First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267, 270 (4th Cir. 1965) (branch application).

Under regulations first announced on February 18, 1971, 36 FED. REG. 3123, and adopted on April 10, 1971, 36 FED. REG. 6888, 12 C.F.R. §§ 5.1-.14 (1972), a more formal hearing procedure was implemented by the Comptroller, under which hearings are to be held upon the request of "any interested person," or, in the absence of such a request, upon the order of the Comptroller or a Regional Comptroller "when either believes it to be in the public interest." 12 C.F.R. § 5.4 (1972).

[3] The Comptroller's regulations at the times relevant here permitted wide latitude in setting these hearing procedures and in conducting hearings; 12 C.F.R. § 4.12(d) provided:

> The person conducting such hearing shall have authority to decide who shall appear as a witness therein, the order of appearance, what testimony, data, or other material or information shall be received in evidence, and all other procedural matters arising during the course of or otherwise connected with such hearing. . . . A hearing ordered by the Comptroller is not required by statute and is not subject to the provisions of the Administrative Procedure Act.

Even under the Comptroller's new procedures he retains a considerable amount of discretion in this area, as evidenced by new 12 C.F.R. § 5.12: "The Comptroller may adopt such different procedures as he deems necessary and reasonable in acting upon any particular application."

mist, and a Senior Attorney from the Comptroller's office in Washington, D.C. The applicant FNB Anchorage was represented by its President and by counsel. Appearing to protest the application were the President of the Alaska State Bank (speaking for both his bank and the Alaska Association of State Chartered Banks) and state Banking Director Robertson (accompanied by one of his Bank Examiners), both represented by counsel. The hearing was directed by the Senior Attorney, Mr. Polking, who opened the proceedings by reviewing the procedures set forth in the Regional Comptroller's memorandum announcing the hearing.[4]

Mr. Polking, as senior attorney for the Comptroller, then entered into the hearing record the entire public file, including FNB Anchorage's application with its supporting exhibits and documents (excepting only material of a confidential nature, such as customer lists), and all information and documents submitted by the protestants. Tr. 6-7. FNB Anchorage chose to make only a brief opening statement through counsel, and rested on its application and supporting documents. Though the President of FNB Anchorage was present at the hearing, *no* request was made by any of the participants to examine or otherwise hear testimony from him, and no objections were raised at the hearing to the manner in which FNB Anchorage presented its case. The protestants then presented testimony from eight separate witnesses and introduced documentary evidence in addition to that which had previously been submitted to the Comptroller and included in the public file.

Following the hearing the panel divided in its recommendations on the application. Mr. Mattersdorf, the econ-

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[4] No objection to these procedures was raised by anyone either at this time or at any time prior to the commencement of the hearing. See Part III of this opinion in which appellant's procedural complaints in this suit are discussed.

omist member, recommended disapproval because of the "overbanked" condition of Fairbanks and the questionable economic outlook for the central-Alaska area. AF 88-89. Mr. Polking recommended approval in the belief that the banking market in Fairbanks could support entry by FNB Anchorage without threatening the solvency or profitability of the existing banks, and that FNB Anchorage should be permitted to follow its customers into the Fairbanks area. AF 80. Regional Comptroller Leaf cast the deciding vote against approval, but the closeness of his decision is reflected by the fact that his recommendation adopted all four of the conclusions found determinative by the other two members of the panel. AF 72. His recommendation to disapprove seemed almost inconsistent with his analysis of the arguments.

Disagreement continued after the application was forwarded to the Comptroller's office in Washington, D. C. There the Director of the Bank Organization Division recommended approval; two Deputy Comptrollers recommended rejection; and on June 26, 1970 the Comptroller rejected the application. By letter of June 30, 1970 FNB Anchorage was informed that their application had been denied. AF 55.

On September 4, 1970 FNB Anchorage requested reconsideration of the decision on the basis of the merits of the original application. No new grounds nor changed circumstances were alleged, but the argument was again advanced that FNB Anchorage "can never truly be competitive with the National Bank of Alaska [who] can continue to take customers away from this bank as long as we are denied serving the Fairbanks area. . . ." JA 12, AF 47.

Additional comments were then solicited from those who had opposed the application at the March 31 hearing. The State Banking Director, Alaska State Bank, and FNB Fairbanks filed protests that argued, in essence, that the only

significant change occurring since the initial rejection of the FNB Anchorage application was further deterioration in the economic prospects for the Fairbanks area.

A new Regional Comptroller, Mr. Selby, wrote an extensive letter to the Comptroller on October 13, 1970 summarizing his view of the relevant factors and recommending approval of the application. JA 151-55, AF 15-21. He, too, noted that Fairbanks seemed to have "an adequate number of banking offices," but he was more impressed by the facts that 83% of the commercial bank deposits in the area were held by the two Fairbanks-based national banks, that a nine-month-old branch of the other major Anchorage-based national bank had been successfully accepted in Fairbanks without any perceptible detrimental effect on the existing Fairbanks banks, and that applicant had a valid claim to protect existing customers. Mr. Selby concluded that these competitive factors weighed most heavily in favor of approval.

During the week of October 19 Mr. Selby visited Anchorage and Fairbanks in order to become "personally acquainted with the banking and economic factors prevalent in [Alaska]." As a result of this visit, he wrote the Comptroller further on October 30: "I have become more fully convinced of the soundness of the arguments presented by [FNB Anchorage] in defense of its application to enter Fairbanks . . . ." JA 157-58, AF 12-13.

Mr. Selby's analysis was favorably received in the Office of the Comptroller, convincing the two Deputy Comptrollers who had previously recommended against approval to change their minds. The Director, Bank Organization Division, again cast his vote for approval, which made the staff recommendation unanimous.[5] Comptroller Camp, on November 6, joined by approving the application, JA 159-60,

[5] The Chief National Bank Examiner did not vote (AF 10).

AF 10-11, and FNB Anchorage and the protesting parties were notified of this approval by letters dated November 10 and 12, 1970. AF 7-9.

By separate correspondence on December 1, FNB Anchorage was reminded that approval was contingent upon using a "distinctive designation" to prevent the confusion inevitable from having two "First National Banks" serving the same area. FNB Anchorage replied on December 18 with a proposal to use and emphasize the name "Interior City Branch" in connection with their Fairbanks operation. The Comptroller approved this designation on December 23, 1970. JA 161, 164-65, AF 1-2, 5.

This action was filed by FNB Fairbanks against the Comptroller on December 18, 1970 seeking review of the Comptroller's actions and a declaratory judgment that his approval of the application was "arbitrary, capricious and unreasonable and an abuse of his discretion" and that the approval was therefore "null and void and of no effect." JA 15. FNB Anchorage was granted leave to intervene as a defendant, and both defendants moved to dismiss or in the alternative for summary judgment; FNB Fairbanks filed a cross-motion for summary judgment. The District Court granted defendants' motions for summary judgment and this appeal followed. We affirm the judgment of the District Court.

II. The Role of State Law in National Bank Branch Applications

The appellant, FNB Fairbanks, urges as its primary grounds for reversal that the Comptroller acted arbitrarily and in abuse of his discretion by failing to follow the provisions of state law that are to govern his decision when acting on branch applications from national banks.

The authority to approve branches of national banks was initially given the Comptroller by Section 7 of the McFad-

den Act,[6] and appears now, as amended, in 12 U.S.C. § 36 (1970) (Emphasis added):

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, *if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively* and not merely by implication or recogtion, *and subject to the restrictions as to location imposed by the law of the State on State banks.* . . .
>
> • • • •
>
> (e) No branch . . . shall be established . . . without first obtaining the consent and approval of the Comptroller of the Currency.

In *First National Bank of Logan v. Walker Bank & Trust Company*, 385 U.S. 252 (1966), the Supreme Court found in this statute and its legislative history a congressional intent "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Id.* at 261.

The doctrine of "competitive equality" results from this country's unique "dual banking system," under which wholly independent state and national chartering authority have grown up together.[7] In cases where conflicts of state

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[6] Act of February 25, 1927, ch. 191, § 7, 44 Stat. 1228. Initially branches were limited to the same locality, but in 1933 statewide branching was authorized where state law authorized such branches for state banks. Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189-90.

[7] Our "dual system" arose largely by historical accident, since

> the National Bank Acts of 1863 and 1864, and the related ten per cent "death tax" imposed by Congress in 1865 on the note issues of state-chartered banks, were intended to provide a sound and uniform national currency by (1) eliminating state-chartered banking (and thus the issu-

and federal supervision arise, as here, we must pay close attention to the congressional design for resolving that specific conflict. In the context of branch banking the "competitive equality" mandated by the statute focuses on the competition for expansion opportunities within each state between individual national- and state-chartered banks. The congressional policy adopted places the competing banks on an equal footing—hence "competitive equality"—by requiring that national banks are to be subject to the same statutory restrictions on branch establishment as are the state banks in each state.[8] Any ambiguity as to the totality of this

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ance of state-bank notes), and (2) providing for a *single system* of federally chartered national banks to issue new national bank notes.

Kreps, *Modernizing Banking Regulation*, 31 J. LAW & CONTEMP. PROB. 648, 649 (1966) (emphasis in original) (footnotes omitted). This combination of legislation did succeed in eliminating state-bank notes, but, wholly unexpectedly, demand deposits replaced bank notes as the primary means for money creation and new life was breathed into the state banking systems.

[8] Congressman Luce, one of the conferees on the state-wide branching bill in 1933, stated with respect to unit and branch banking: "[T]he two ideas shall compete on equal terms." 77 CONG. REC. 5896. In 1941 the Michigan Supreme Court expressed the same idea: "[T]he thought was to place both banking systems upon an *equal competitive plane*." Rushton v. Michigan Nat'l Bank, 298 Mich. 417, 299 N.E. 129, 134 (1941) (emphasis added). This was a quo warranto action in state court to test the authority of the Michigan National Bank to operate certain branches.

The significance of this deference to state law is perhaps best illustrated by the remarkable diversity between states in their approach to branch banking. In 1970 only 19 states permitted state-wide branch banking; 16 states permitted branching on a limited basis; and 15 states either prohibited branching entirely or severely restricted it. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 437 (92d ed. 1971).

national deference to state law was resolved in *Walker Bank, supra,* 385 U.S. at 261:

> It appears clear from this résumé of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of "*competitive* equality" insofar as branch banking was concerned. . . . It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. . . .
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> . . . It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there "only to the extent that the State laws permit branch banking." (Emphasis added.)

Three years later, in *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969), the Court repeated the same thought while dealing with the related problem of the definition of a branch in Section 36(f) of Title 12 U.S.C.:

> The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.

396 U.S. at 133. Thus, the statute and these decisions establish that the Comptroller's consideration of branch applications by national banks must be guided and controlled by the appropriate state's law on branch banking.

Appellant here argues that the Comptroller did not properly consider Alaska's laws on branching when he approved FNB Anchorage's application to establish a branch in downtown Fairbanks. This argument proceeds along two separate lines: First is the contention that the opinion of Mr. Robertson, Director of Alaska's Division of Banking and Securities, constitutes an official expression of state policy,

and as such is a part of the state law by which the Comptroller is bound in his decision. Thus, since Mr. Robertson repeatedly and forcefully opposed this application, appellant contends that the Comptroller's approval was arbitrary and an impermissible abuse of his discretion. Secondly, FNB Fairbanks contends that the substantive requirements of the Alaska statutes governing branch banking were arbitrarily and capriciously ignored by the Comptroller in approving this application. We will consider each of these allegations in turn.

A. *The Banking Supervisor's Opinion as State Law*

Appellant bases his principal argument, that the Comptroller's discretion to approve this application is constrained by Mr. Robertson's views and opposition, upon a broad reading of the language from *Dickinson* "that a 'branch' may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch . . . ." 396 U.S. at 130. Paraphrasing this language, appellant asserts that "[i]f a state bank does not qualify under state law to establish a branch bank in Fairbanks—*a fortiori,* neither does a national bank qualify." Brief for appellant, at 23. Since State Banking Director Robertson has repeatedly stated that his assessment of economic and banking conditions in Fairbanks would preclude his approving a branch application from any state bank,[9] appellant's argument concludes that no state bank

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[9] *See, e.g.,* Mr. Robertson's testimony at the Comptroller's hearing in Portland:

> Q. If on this date or at the time the First National Bank of Anchorage filed its application for Fairbanks, a state chartered bank, one of the banks in your system, were to file an application for a branch operation in the City of Fairbanks, would you grant it or deny it and if so, why?
>
> A. . . . [W]e would deny it because we believe Fairbanks is over banked.

Tr. 85.

and, *a fortiori,* no national bank "qualif[ies] under state law to establish a branch bank in Fairbanks."

In its simplest terms, appellant's argument is that the opinion of the state supervisor as to the application of the state law constitutes an expression of official state policy that is as binding on the Comptroller as any other provision of the "statute law of the state," 12 U.S.C. § 36(c). This proposition is a novel one, and neither party has been able to cite case authority precisely on point. Our reading of the most closely analogous cases, as well as our understanding of the purpose of Section 36(c), leads us to a more restrictive view of the *Dickinson* language than that urged upon us by appellant.

Appellant cites two cases in support of this argument; *Nuesse v. Camp,* 128 U.S.App.D.C. 172, 385 F.2d 694 (1967), and *Jackson v. First National Bank of Valdosta,* 349 F.2d 71 (5th Cir. 1965). Both cases involved attempts by state banking supervisors to prevent branch establishment by national banks within their respective states, and the holding of both cases was that the supervisors had standing to sue in opposition to new national bank branches. Appellant FNB Fairbanks would convert this acknowledgment of the state supervisors' *interest in litigation* contesting national bank branching into a recognition of the supervisors' *substantive opinion* on the legality of the branch application as a component of the controlling state statute law on branching. These two cases do not support such an extension of their holding. They merely hold that state banking supervisors, by virtue of their official position, have standing to oppose the establishment of branches of national banks they consider to be violative of the applicable federal and state law. To permit a state banking supervisor "to appear as a party to urge the construction of the federal statute that he claims is necessary to secure the state's interests," *Nuesse v. Camp, supra,* 128 U.S.App.D.C. at 179, 385 F.2d

at 701, is a far different proposition than the appellant's assertion that the State Commissioner's oral opinion applying state law to a specific factual situation is binding upon the Comptroller and this court. We decline to so hold.

To the same effect is our decision in *Union Savings Bank of Patchogue v. Saxon*, 118 U.S.App.D.C. 296, 335 F.2d 718 (1964) and two District Court cases. In *Patchogue, supra*, the Comptroller had authorized a national bank to establish a branch in an "unincorporated village," utilizing a New York Banking Department interpretation of the meaning of that term. The District Court granted summary judgment in favor of the Comptroller in a competing bank's suit to block the branch. We reversed, saying:

> Since we are of the opinion that the § 36(c) reference to "the statute law of the State" includes legislative enactments and not administrative interpretations of those enactments, the New York Banking Department's view of § 105 of the New York Banking Law would not be authority for the establishment of the Tinker branch.

Two District Court cases also hold that state administrative views are not to be considered controlling. In *South Dakota v. National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), a *rule* of the South Dakota State Banking Commission prohibiting the establishment of a branch bank more than fifty miles from the home office would have precluded establishment of a branch in the location sought by the defendant national bank. This rule was found to be an "invalid . . . attempt . . . to exercise legislative power," contrary to the state's branching statute and it was therefore held inapplicable to the national bank since Section 36(c) incorporates only the statute law of the state.

Similarly, *Leuthold v. Camp*, 273 F. Supp. 695 (D. Mont. 1967), *aff'd per curiam*, 405 F.2d 499 (9th Cir. 1969), rejected a formal opinion of the Attorney General of Montana,

which the Superintendent of Banks of the state considered binding upon himself. The court concluded: "If the administrator of the state law sees fit to deprive the state banks of rights which the statute law [of the state] gives them, the resulting inequality is created by administrative fiat and not by statute law." 273 F. Supp. at 701.

Though in each of these cases the opinion of the state supervisor was rejected, they cannot properly be read to support appellee's proposition that the state supervisor's opinion must always yield to a contrary view held by a federal court or the Comptroller. In each instance, the rejection was based on a finding that the supervisor's views were in conflict with the statute law of the state. However, where such a conflict is found, it makes no difference whether it is the state supervisor's or the Comptroller's opinion that is involved; a fair reading of the statute law of the state, as incorporated within the National Bank Act by Section 36(c), must determine whether or not branching is proper.

Despite *Walker Bank* and *Dickinson,* the Comptroller apparently continued to resist the notion that he, too, was bound by the statute law of the states. In both *First-Citizens Bank and Trust Company v. Camp,* 409 F.2d 1086 (4th Cir. 1969) and *First National Bank of Catawba County v. Wachovia Bank & Trust Company,* 325 F. Supp. 523 (M.D.N.C.), *aff'd per curiam,* 448 F.2d 637 (4th Cir. 1971), the Comptroller argued that he was not bound by the "need and convenience" and "solvency of the branch" criteria of North Carolina's banking laws. The District Court in *Wachovia* vividly expressed his displeasure at this continuing recalcitrance:

> Throughout his opinion, the Comptroller argues at great length as to why the pronouncements of the United States Supreme Court in the *Walker Bank* case and the holdings of the district court and the Court of Appeals in the *First Citizens Bank* case are unsound law and attempts to rationalize his reasons for ignor-

> ing these decisions. . . . He ends his opinion by stating that he declines to make findings with respect to "needs and convenience" criteria "as required of the State Banking Commissioner by Section 53-62(b) of the North Carolina General Statutes." Having arbitrarily and capriciously elected to ignore clearly defined principles of law, it follows that the opinion of the Comptroller approving the application of Wachovia is a nullity. . . .

Taken together these cases establish only that where either the state or federal administrator's opinion conflicts with the statute law of the state that opinion must be rejected. Where the state supervisor and the Comptroller have reached conflicting opinions on a branch application because of their conflicting interpretations of the state branching statute, a situation which we believe to exist here, we are confronted with a different factual situation than in any of these other cases. We are bound by Section 36 and its policy of "competitive equality" in seeking to resolve this conflict.

By its express terms, Section 36 makes branch establishment by national banks contingent upon the "consent and approval of the Comptroller." 12 U.S.C. § 36(e) (1970). Thus if our conflict of views as to the proper construction of the applicable statutes arose in the setting of a state supervisor's opinion favoring the branch and the Comptroller opposing it, presuming of course that both views were in accord with the state's statutory requirements, Section 36(e)'s requirement of the Comptroller's approval for any branch of a national bank would clearly result in denial of the branch application. In part this is due to a procedural obstacle; the Comptroller could not be forced to approve the branch because his action would be within the scope of his discretion protected from mandamus or the normal standards of judicial review. Another aspect, however, is that there is authority for the view that the Comptroller's interpretation of the state statue is, under Secion 36, purely

a question of federal law—that for the purpose of approving national bank branches not even state judicial interpretations of the state statute would control the federal interpretation. *Howell v. Citizens First National Bank of Ridgewood*, 385 F.2d 528 (3d Cir. 1967).[10]

The purposes of Section 36(c) lead us to a similar result where we are faced with a conflict in which the state supervisor protests and the Comptroller approves a national bank branch application upon what we find to be a sound interpretation of federal and state law. The "competitive equality" of Section 36(c) is an equality of opportunity for expansion. Under its provisions the state statutory restrictions on branching were intended by Congress to apply equally to state supervisors in approving branches for state banks and to the Comptroller in approving branches for national banks. To accept the appellant's view would be to impose the additional restraint on national banks of a veto power in the hands of the state supervisor.

Appellant argues that since state banks must obtain the state supervisor's approval, giving him that veto power

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[10] Howell, the New Jersey Commissioner of Banking, sought to enjoin approval of a national bank branch, arguing that its establishment would violate the applicable provision of New Jersey law. The trial court invoked the abstention doctrine and entered an order staying proceedings pending initiation of an action in the state courts to decide the challenged question of state law. The Third Circuit reversed, holding:

> [T]he determination of the extent of the application of a state branch banking statute to a national bank under the federal Banking Act of 1933 is purely a question of federal law, a question to be decided by reading the state statute through lenses prescribed by the Congress. A decision by the state courts as to the meaning and application of a state branch banking statute would not be conclusive on the federal courts as to this federal question and might be wholly irrelevant.

385 F.2d at 530.

over national banks equalizes branching opportunities between the two. That would not be equality of opportunity. Moreover it is not required by the applicable federal statute. Section 36(c) provides:

> a national banking association may, with the approval of the Comptroller . . . establish . . . new branches . . . if such establishment [is] authorized to state banks by the statute law of the state in question.

Insofar as this provision is concerned, the authority of the Comptroller to approve any branch depends on the *existence* of a state law in which branches are "authorized"; it in no way requires the additional approval of the official administering the state banking statute, even where the state statute requires such approval for branches of state banks.[11]

If the Comptroller could exercise a veto power over state bank branching similar to that here claimed for the Alaska supervisor by appellant, *then,* if competitive equality were the sole standard, both state and national banks would be equally constrained by the requirement of joint approval by both the state supervisor and the Comptroller. Such a result would achieve the equality of expansion opportunity sought by Section 36(c), but it would totally destroy the *competitive* aspect that lies at the heart of both Section 36(c) and our "dual banking system." Both the statutory language of Section 36(c) and the competition component of the doctrine

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[11] We do not interpret the subsequent phrase, "and subject to the restrictions as to *location* imposed by the law of the state on state banks" (emphasis added) as adding anything other than a requirement to comply with those provisions of the state statutes that restrict the physical location of branches. Such limitations on location are frequently woven around political subdivisions, mileage limits, "home office protection" of competing banks, etc. This clause of Section 36(c) merely adopts these geographical limitations for national banks.

of "competitive equality" require that neither state nor federal administrator be empowered to veto branch authorizations of the other. The state supervisors apply their state statutes in evaluating state bank branch applications wholly independently of any federal supervision, and we hold that the Comptroller may similarly apply those same state statutes in evaluating national bank branch applications independently of control by the opinions of the state supervisor.[12]

This interpretation satisfies the requirements of Section 36(c) and its underlying principle of competitive equality. Both the state supervisor and the Comptroller are bound to follow the state branching statute; it is the language of that statute that controls. Neither state nor federal administrators may circumvent its dictates by unsound opinions or practice. State opinions interpreting their branching laws are to be considered by the Comptroller, but whether they are to be followed depends upon their conformance with the "statute law of the state in question."[13] The Comp-

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[12] We interpret the *Jackson* and *Nuesse* opinions as being limited to the procedural aspects raised therein. Clearly the state supervisor has an interest in the Comptroller's interpretations of the state statute, for where the Comptroller's and state supervisor's views differ an inequality of expansion opportunities may conceivably arise. To forestall this result the state supervisor must be granted a forum in which to argue that the Comptroller's view does not comport with the state statute. We hold only that where the Comptroller's view is found to be consistent with the federal and state statutory restrictions, a contrary opinion of the state supervisor does not constitute an absolute bar to the Comptroller's approval of a national bank's branch application. Rushton v. Michigan Nat'l Bank, *supra* note 8, is an interesting state case to this effect.

[13] Leuthold v. Camp, 273 F. Supp. 695 (D. Mont. 1967), *aff'd per curiam*, 405 F.2d 499 (9th Cir. 1969); South Dakota v. National Bank of South Dakota, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964).

troller's obligation is to weigh each branch application against the standard imposed by the statute law of the state, and to deny the application if that standard is not met.

B. *The Requirements of Alaska Law*

As hereinbefore described, in order for the Comptroller's approval of FNB Anchorage's branch in Fairbanks to be valid, the requirements of the Alaska Banking Code concerning branching must be met. In this case there is no specific finding anywhere in the record that the Comptroller found that the application complies with the Alaska Banking Code.[14] In the face of this failure to make an express finding that the application complies with the most basic requirement of Section 36(c) and the Supreme Court's *Walker Bank* and *Dickinson* decisions, we have been extremely careful in scrutinizing the administrative record here for evidence that the Alaska Banking Code's requirements have been met. It is only our conviction that there is substantial evidence in this record supporting the conclusion that the "statute law" of Alaska concerning branch banks has been complied with that permits us to affirm the District Court's summary judgment in favor of the Comptroller.

The Alaska Banking Code imposes two restrictions on branching that the appellant contends were not met in FNB Anchorage's application for a branch in Fairbanks. These are that "the addition of the proposed facilities in the community is not detrimental to a sound banking system," and that "the name is not deceptively similar to that of another bank in the proposed community or otherwise mislead-

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[14] *Cf.* First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969); First National Bank of Catawba County v. Wachovia Bank & Trust Co., 325 F. Supp. 523 (M.D.N.C.), *aff'd per curiam*, 448 F.2d 637 (4th Cir. 1971).

ing."[15] Each of these requirements will be considered in turn.

1. *The "sound banking system" standard.*

It is evident here that the state supervisor and the Comptroller have conflicting views as to whether the "sound banking system" criterion has been met. The parties have all conceded that there is no existing administrative or judicial interpretation of this section of the Alaska Banking Code, so that both the state and national bank administrators approached this statutory requirement with no previous interpretive gloss on the meaning of a "sound banking system." By enacting such a broad and subjective standard as this, the Alaska legislature obviously intended to leave a great deal of room for the exercise of administrative discretion in applying the standard. And since this provision was enacted in 1951,[16] the legislature was well aware that under existing federal law[17] the state statute would also serve as

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[15] Alaska Stat. §§ 06.05.415(1), (3) (1962):

> The department shall issue a certificate of authority to operate a branch bank, or to operate the principal office of a bank or a branch bank in a changed location, if
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> (1) the department determines that the addition of the proposed facilities in the community is not detrimental to a sound banking system;
>
> * * * *
>
> (3) the name is not deceptively similar to that of another bank in the proposed community or otherwise misleading.

[16] Session Laws of Alaska, 1951, March 26, 1951, ch. 129, § 3.221E.

[17] Since February 25, 1927 federal laws have conditioned authority to establish new branches of national banks upon the right of state banks to establish branches under "the law of the state in question." Act of Feb. 27, 1927, ch. 191, § 7, 44 Stat. 1228, *as amended*, 12 U.S.C. § 36 (1970).

the basis for the establishment of branches of national banks. Once a state legislature has authorized branches for state banks they have opened the door to competition between unit and branch banking for both state and national banks. It is only natural that the state and national bank administrators, with their very different responsibilities and frames of reference, might develop different perspectives on what might be determined to be a "sound banking system." We believe that in the context of our dual banking system, the congressional policy of competitive equality embodied in Section 36(c) requires that we respect these differing perspectives in determining whether so broadly discretionary a requirement as is here involved has been met.

Alaska Banking Director Robertson's construction of a "sound banking system" can be deduced from his testimony at the Regional Comptroller's hearing and his documentary submissions included in the administrative record. His principal concern with Alaska's banking system appears to be concentration of banking resources.[18] Of the ten commercial banks in the state at the end of 1969, the two largest, National Bank of Alaska and FNB Anchorage respectively, held nearly 60% of the state's commercial bank deposits and operated 38 of 69 banking offices. Accentuating this concentration, in Mr. Robertson's opinion, is the smallness of the remaining eight commercial banks (none of them held as much as 50 million dollars in deposits), and the fact that the size and remoteness of Alaska itself are significant obstacles to expansion for the smaller banks.

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[18] Virtually all of his substantive comments in his direct testimony at the hearing were directed toward the issue of the banking structure of the state. Tr. 58-63. *See also* AF 302-304. When we recognize that the total population of Alaska in 1970 was only 294,607, the absence of numerous financial institutions does not appear to be unusual.

It is also apparent that Mr. Robertson's interpretation of a "sound banking system" would include a more nearly equal asset balance between the national and state banks. His initial documentary submission to the Comptroller to protest this application included the following:

> We recognize that many areas of Alaska are now approaching an era of unprecedented growth and expansion. We also recognize that as resource development and general business activity increases and population expansion actually occurs, the resulting financial needs must be served. We view these favorable prospects as an excellent opportunity for the chartering authorities to create a "balanced" banking system and to begin to correct the imbalance between state and national banks which exist [*sic*] at the present time.
>
> In making this adjustment, it would be incumbent on the chartering authorities to move cautiously considering only that development which has actually occurred, or is eminent[*sic*]. We believe progress toward a *balanced system* can be made by not allowing any bank to move into those areas showing only "future promise" and, in effect, pre-empting competition. [Emphasis added.]

AF 301. In his testimony at the hearing Mr. Robertson repeated this theme, while implying that the statutory requirement of a "sound banking system" imposed on him in his official capacity the role of a promoter of state banks:

> Q. Do you think that the state banks in Alaska should have an opportunity now to expand to a point where they can catch up, so to speak, with the larger National Banks in Alaska?
>
> A. . . . I think they should not be precluded by any premature expansion by banks who feel that they are in a position to do it.
>
> Q. Well, you would like to see the state banks catch up, so to speak, would you not?
>
> A. Certainly. *As a state supervisor concerned with promoting and maintaining a sound banking system we have to be concerned with this.*

Tr. 65-66 (emphasis added).

Mr. Robertson's application of this rationale to the application involved here is explained by another of his general comments:

> State banks are studying the growth areas throughout the State and are prepared to move into those where economic justification is evident. It is our concern that they will not [*sic*—intended to read "will"!] be precluded from doing so simply by national banks moving into "promising" areas well in advance of actual development. In this connection, we believe it is important to realize that although the future appears bright, comparison of key state-wide economic indicators show rather modest rates of expansion.

AF 301. Mr. Robertson's evidence on the economic prospects for Fairbanks suggests that it is indeed a "promising area," but an area whose promise is clouded by the uncertainty accompanying the unresolved questions concerning development of the Alaskan North Slope oil fields. AF 23-42, 338-47. This economic analysis, coupled with the fact that the Fairbanks area ratio of population to existing banking offices was far lower than the statewide average (Alaska's statewide average is itself one of the lowest in the nation), prompted Mr. Robertson to conclude that "there are already too many banks for the size of the city. . . . I feel very strongly that [the] proposed new [branch] would seriously jeopardize all existing banks in Fairbanks and make it exceedingly difficult for them to compete there and elsewhere." Tr. 62.

Mr. Robertson, both on cross-examination and in response to questions from the hearing panel, strenuously resisted suggestions that his position implied a recommendation for placing a moratorium on national bank branch approvals. Tr. 64-70, 86-88. However, we find it difficult to understand how Mr. Robertson would accomplish his "catching-up" without providing state banks with some competitive advantage in the exploitation of expansion opportunities. From his entire testimony it is apparent that

he interprets the "sound banking system" standard to mean a "sound *state* banking system," but that view appears to us to lead to a result inimical to the policy of competitive equality that underlies Section 36 of the National Bank Act. The fact that state banks may be precluded by capital inadequacy or managerial weakness from exploiting expansion opportunities into "promising" but not-yet "developed" areas should not constrain national banks better able to withstand such risks from doing so. A defect, however, in Mr. Robertson's approach is that the standard of a "sound banking system" is not necessarily related to the size of either the state or national system. The relative amount of assets in either system is not a determining factor of the soundness of the banking system where state and national banks exist and operate side by side.[19]

The Comptroller's interpretation of the parameters of Alaska's "sound banking system" standard is understand-

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[19] Comparative national banking statistics are interesting in this regard:

Commercial Banks—1970

Banks	*Number*	*Banking Offices*	*Assets ($ billions)*
By type			
National banks	4,621	17,157	340.8
State banks			
Federal Reserve members	1,147	4,802	125.5
Non-member, FDIC insured	7,735	13,139	106.5
Non-insured	184	433	4.4
By state branching laws			
States with statewide branching	1,306		
States with limited branching	4,941		
States with no branching	7,440		

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 435, 437 (92d ed. 1971).

ably colored by considering Section 36 competitive equality and his personal responsibility for supervising national banks. He, too, is cognizant of the dominance of the two largest national banks in the Alaskan banking structure.[20] However, having previously authorized a branch of the National Bank of Alaska—the larger of the two—in Fairbanks, one factor weighing heavily in favor of granting this application was to provide FNB Anchorage the opportunity to continue its head-to-head statewide competition in the Fairbanks area.[21] Another competitive factor was the nearly complete domination of the Fairbanks banking market by two other national banks—appellant FNB Fairbanks and Alaska National Bank of Fairbanks —who together hold 83% of the commercial bank deposits in the area. AF 17. A branch of FNB Anchorage promises to bring new competition to banking in Fairbanks.

Another of the Comptroller's standards for evaluating the soundness of the Alaskan banking system is his eval-

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[20] The economist member of the hearing panel had written: Other states show even greater duopoly control of the commercial banking industry (e.g. Oregon). But I question whether such high concentration ratios should be encouraged or countenanced by the Comptroller if they are only now developing. While we have no guidelines regarding the upper limits of appropriate market shares by a state's two largest banks, I believe that such limits—however undefinable—should be considered. The NBA and FNB Anchorage may, jointly, have reached them. AF 85.

[21] Prior disapproval by the Comptroller of FNB Anchorage branch applications at Kenai (1967) and Fairbanks (1965, 1970), while National Bank of Alaska was successful in having branch applications approved at both locations (AF 17-18), may have indicated a prior prejudice or favoritism that the Comptroller sought to correct. Since 1960 the National Bank of Alaska has had 13 branch applications approved by the Comptroller and one disapproved; FNB Anchorage has had 4 approved and 4 disapproved (AF 17, 19, 20).

uation of the soundness of individual banks, and here again the scale tips in favor of this application. The economist member of the hearing panel hinted at this factor as follows:

> The unstated case for the FNB Anchorage's proposed branches is twofold: . . . and (perhaps also) to put pressure on one or both of the established National banks in Fairbanks which have required exceptionally close supervision by the Regional Administrator because of various deficiencies in management.

AF 88. This argument was no longer "unstated" upon reconsideration of the application. Mr. Selby, the new Regional Comptroller, included in his recommendation for approval a comment upon the asset, managerial and capitalization problems of the two local national banks. AF 17. Following his visit to Fairbanks shortly after writing his initial comments, Mr. Selby wrote again:

> The First National Bank of Anchorage will meet stiff competition from the two Fairbanks-based banks . . . . The First National Bank of Fairbanks and the Alaska National Bank have a definite advantage in the city, and there is no basis for sheltering them from further competition, although both have certain asset and managerial problems.

AF 12. Perhaps increased competition will cause changes that resolve these problems; perhaps there will be no significant change at all and the Fairbanks market will be able to support both the stronger and weaker banks. Whatever the end result, we see illustrated here the Comptroller's concern with the soundness of management of individual national banks, which must surely be considered a reasonable component of the Alaska statute's "sound banking system." It is apparent that the Comptroller interprets the statute to mean a "sound banking system *for the state*," an interpretation which we consider to more nearly conform to the legislative intent.

Next, we note the record reflects that the members of

the staff of the Comptroller's office who considered the branch application found that its approval would not adversely affect the Fairbanks banks. Staff members so finding included: the bank examiner who made the initial investigation, JA 145, AF 69; the Regional Comptroller, AF 72, see also JA 147; Mr. Polking, the hearing panel member, JA 135, AF 80; and Mr. Selby, the new Regional Comptroller, AF 17, AF 12. These officials weighed the relevant facts and expressed their opinions that the existing banks would not be seriously affected, adversely affected, threatened or endangered. Typical of their comments was that of Mr. Polking, the hearing panel member who had voted in favor of the application:

> From the evidence presented at the hearing, it is my opinion that the present and future banking market in Fairbanks will support the entry of applicant's branch and that the solvency and profitable operation of the Fairbanks banks will not be threatened by approval of this application.

JA 135, AF 80. The repeated expressions of the Comptroller's staff of the expected compatibility of this branch and the existing banking facilities provide strong support for the conclusion that approval of the application would not, at the very least, be detrimental to the existing Fairbanks-based banks.

Finally, we turn to Mr. Robertson's contentions concerning the desirability of "balance" in the banking structure of the state. The Bank Examiner's Investigation Report succinctly framed the critical question:

> The question appears to be whether or not Alaska wants branch banking. If they want branch banking, it should be permitted on a statewide basis and the letters of protest have little merit. If they want unit banking, the letters of protest have some merit . . . .

JA 145, AF 69. There is little question from this record that Alaska wants branching. The Alaska Banking Code

permits it, both state and national branches have been authorized and despite Mr. Robertson's opinions concerning "balance" he stated at the hearing that "I am in favor of expansion by either state or national banks where it is justified. . . . Our position on expansion is that where expansion is justified by economic conditions, by population, and so on, we encourage it." Tr. 64.

Mr. Selby's letter of October 30, 1970 specifically addresses this issue, and directly contradicts the "balanced" banking system views of Mr. Robertson:

> Alaska is an ever-expanding state with dynamic possibilities, and population growth, particularly in the Anchorage area, is assured. It will become increasingly important for all of the Alaska banks to establish branching lines to their customers as this growth continues. . . .
>
> Very little consideration can be given to the arguments presented at the hearings here in Portland relative to giving the smaller unit banks priorities on branch locations. *If the larger branch systems are stifled in their branch expansion, the viability of the banking structure in Alaska is damaged,* and customers of those banks suffer the consequences.
>
> Since paying a personal visit to Alaska, I have become more fully convinced of the soundness of the arguments presented by The First National Bank of Anchorage in defense of its application to enter Fairbanks and to establish branches at other locations to compete with the well-defined branch system of the National Bank of Alaska.

AF 12-13 (emphasis added).

It is apparent from the foregoing that Mr. Robertson and the Comptroller's office differ in their interpretation of what constitutes a "sound banking system" in Alaska. We find, however, that the interpretation expressed by the Comptroller's office more nearly comports with the legislative intent expressed in Section 36(c) and the Alaska statute. Furthermore, we find substantial evidence

in this record to support the conclusion that approval of this branch will not be "detrimental to a sound banking system" in any sense other than Mr. Robertson's alleged pre-emption of expansion opportunities in one of "those areas showing only 'future promise.'" Yet we have already stated our belief that in this specific respect Mr. Robertson's view of the "balance" necessary for the soundness of Alaska's banking system does not comport with the competitive equality mandated by Section 36(c) of the National Bank Act. Accordingly, we find substantial evidence that in approving this application the Comptroller did comply with Section 36(c) and the "sound banking system" standard of the Alaska Banking Code, and that the District Court's summary judgment in favor of the Comptroller on this point was properly granted.

2. *The "deceptively similar" name criterion.*

Appellant argues, and we believe properly so, that a branch of FNB Anchorage in Fairbanks could pose a serious problem under the "deceptively similar" name criterion; it could be seriously misleading for FNB Anchorage to open a new "First National Bank" branch in a city which has known FNB Fairbanks as the only "First National" for more than 65 years. However, we believe it is perfectly apparent from the record that the Comptroller clearly recognized this problem at several stages of the proceedings and explicitly conditioned his approval of the application on the use of some distinctive name for FNB Anchorage's operations in Fairbanks.[22]

Appellant makes much of the fact that the initial letter of approval of the application, dated November 10, 1970, was not qualified in this manner. We find the Comptroller's letter of December 1, 1970 self-explanatory:

> A review of our file indicates that our letter dated

[22] *See, e.g.*, AF 1-2, 5, 14, 18, 24, 75.

> November 10, 1970, which approved the captioned application, made no express reference to the name by which this branch office will be designated.
>
> Inasmuch as a bank with the words "First National Bank" in its title presently maintains banking operations in Fairbanks, we will require that the instant branch receive a distinctive designation which will eliminate possible confusion arising from name similarity. At your earliest convenience, please submit for the approval of this Office, a suggested branch name which will accomplish this purpose.

AF 5. On December 23, 1970, the Comptroller approved the designation "Interior City Branch" for use in "advertisements and other public representations concerning this banking office." AF 1. We do not believe this belated correction of what was so clearly an administrative oversight vitiates in any degree the conclusion that the Comptroller's approval was conditioned on the use of a distinctive name.[22] Accordingly, we believe that the record sup-

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[22] FNB Fairbanks further alleges in an affidavit by its President in support of its motion for a preliminary injunction in the District Court, as evidence of a lack of good faith in fulfilling this requirement, that FNB Anchorage has already commenced advertising that is deceptive. We find this a strange complaint. The advertisement indicates only that FNB Anchorage has a branch in Fairbanks. If one were to arrive in Fairbanks and look for the "First National Bank" there, since the Comptroller has required FNB Anchorage to prominently represent its local branch as "Interior City Branch," it is quite likely that the stranger would end up in the "First National Bank of Fairbanks" offices. Only one who knew in advance that the "Interior City Branch" he found in Fairbanks was really the FNB Anchorage branch would be able to easily find the right bank if he were responding to the advertisement. The complained of advertisement, and its "deceptiveness," would thus seem to inure to the benefit of the plaintiff, a situation that hardly "adversely affects," "irreparably harms," or otherwise provides plaintiff a basis for complaint. Moreover, if FNB Anchorage indulges in deceptive advertising the complaint should be addressed to the Comptroller in the first instance.

ports the District Court's finding that "the Comptroller considered himself bound by, and did follow, the 'deceptive name' restriction in the Alaska statute. His determination that the use of a distinctive designation would satisfy that restriction is not improper or an abuse of discretion." JA 88.

III. Appellant's Procedural Contentions

FNB Fairbanks argues as another ground for reversal that basic concepts of administrative due process were violated in the Comptroller's conduct and use of the public hearing. The argument is made in two separate allegations of error: (1) that the failure to force testimony from and to permit cross-examination of FNB Anchorage's President "made a mockery of the public hearing," and (2) that in view of the refusal of FNB Anchorage's President to testify at the hearing the Comptroller accorded too much weight to the documentary evidence submitted by applicant in evaluating its merits against the volume of testimony presented by the protestants. It is, however, clear that these two allegations are both founded on the same underlying assertion—that the protestants were improperly denied an opportunity to confront applicants' President through cross-examination and thereby "probe the veracity of the statements contained in" the application.[24]

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[24] We note initially that these procedural complaints were first raised in the District Court. Neither appellant nor any of the other protestants present at the hearing raised any objection to the Regional Comptroller's memorandum of procedures to be followed, or to the conduct of the hearing itself. In another case in which procedural objections to a Comptroller's hearing on branch applications were raised for the first time in the trial court, the Fourth Circuit stated:

> [Plaintiff's] right to raise at the judicial level procedural objections not advanced before the administrative agency is suspect, because, ordinarily, a litigant is not entitled to remain mute and await the outcome of an agency's

We believe the appellant has misconstrued the purpose and function of the public hearing in branch application proceedings in the office of the Comptroller and that this procedural complaint derives from that misunderstanding. To begin, the Comptroller at the time of this application was not required to hold any hearing on branch applications.[25] When such hearings are held, the proceedings are not intended to be adversary, trial-type adjudicative hearings, but rather the hearing panel "is simply an investigatory or fact-gathering organ, not having any fact-finding function." *First-Citizens Bank and Trust Company v. Camp*, 409 F.2d 1086, 1090 (4th Cir. 1969). In this case, the hearing was granted in response to the protestants' request that they be given "a full opportunity to elaborate

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decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level. [citations omitted]

First-Citizens Bank and Trust Company v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969). Appellant's right to raise these objections here is even more highly suspect since the initial outcome of the hearing was *favorable* to appellant's position—not only did the hearing panel recommend disapproval of the application, but the Comptroller initially concurred with that recommendation. To delay raising procedural complaints about the hearing until after the Comptroller's unfavorable decision on reconsideration heightens the objection that the complaint is not well-founded.

[25] *See* cases collected in note 2, *supra;* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4.04, 4.16, 7.01, pp. 185, 216-17, 304-305 (1970 Supp.). Under his revised regulations, see notes 2 & 3, *supra*, and 12 C.F.R. §§ 5.1-.14 (1972), the Comptroller has declared that a hearing will be held upon request from "any interested person." With the exception of this change in policy concerning entitlement to a hearing, the new regulations do not appear to us to mark any significant departure from the practices or procedures followed in the hearing on this application.

upon the reasons for their opposition." JA 107, AF 354. The critical feature of such a "fact-gathering" procedure, in order to provide the protestants with their opportunity to formulate a reasoned opposition, is to enable them to "know and meet opposing evidence with explanation or rebuttal evidence." *First-Citizens, supra,* 409 F.2d at 1090. Neither oral testimony nor cross-examination of applicant's President is necessary for accomplishing this. By making all documents concerning the application (excepting only those considered confidential because of their proprietary nature) available in a public file, then introducing the contents of that file into evidence at the hearing, protestants were provided both the knowledge of applicant's evidence and the opportunity to explain or rebut that evidence with either documentary or testimonial evidence of their own.[26] We do not find that anything more was required.

As for the contention that too much weight was accorded the applicant's evidence, we fail to see how appellant can possibly protest the relative weights assigned to the evidence in view of the fact that both the hearing panel and the Comptroller in his initial action found in favor of the protestants. The Comptroller's subsequent approval of the application upon reconsideration appears largely based on the analysis and recommendations provided by Mr. Selby following his personal visit to Alaska in October 1970. Thus that approval cannot be understood as having been based on an improper weighting of applicant's evidence at the March 1970 hearing. We must also recognize that the Comptroller's office brings wide knowledge and

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[26] In fact, the protestants were permitted to submit documentary evidence without a sponsoring witness subject to cross-examination in precisely the same manner (though, to be sure, not to the same extent) as FNB Anchorage submitted, and rested upon, their application with its supporting documents. Tr. 46-49.

expertise in banking to bear on decisions such as when and where to approve a bank charter or branch bank. They have been entrusted with power in this area for many years.

We must, then, conclude that on both the procedural and substantive grounds raised by FNB Fairbanks, there is substantial evidence in the administrative record to support the summary judgment granted by the District Court in favor of the Comptroller and that the record reflects that the approval of the application by the Comptroller complied with both federal and state law. That judgment is accordingly

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIRST NATIONAL BANK OF FAIRBANKS, Plaintiff,	)	
v.	)	Civil Action No. 3702-70
WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, Defendant,	)	
v.	)	
FIRST NATIONAL BANK OF ANCHORAGE, Intervening Defendant.	)	

MEMORANDUM OPINION

Plaintiff, a national bank headquartered in Fairbanks, Alaska, brings this suit for declaratory judgment and injunctive relief contending that the defendant Comptroller of the Currency abused his discretion and violated his own procedural requirements by approving the application of intervenor, a national bank having its main office in Anchorage, Alaska, to open a branch in downtown Fairbanks. The parties have submitted the case on cross-motions for summary judgment.

On September 17, 1969 intervenor First National Bank of Anchorage (FNB Anchorage) filed an application with the Comptroller to establish a branch bank in the business

district of Fairbanks, Alaska. The Comptroller notified plaintiff and every other bank conducting business in Fairbanks and the Director of the Division of Banking and Securities for the State of Alaska that the application had been filed and solicited their comments. A field investigation by a bank examiner was also undertaken.

On March 31, 1970 a hearing on the application was held in the Regional Comptroller's office in Portland, Oregon. Testimony of various protesting banks and the Director of the State Division of Banking and Securities was offered in opposition to the application. On June 30, 1970 the Comptroller denied the application of FNB Anchorage to open the branch.

On September 4, 1970 FNB Anchorage requested the Comptroller to reconsider its application. Objections to the reconsideration request were filed with the Comptroller by several banks and the State Division of Banking and Securities. The Comptroller made an investigation of the then current economic condition of Fairbanks and relevant events occurring after the filing of the original application.

On November 10, 1970, after reconsideration and in accord with the unanimous recommendations of his subordinate officials, the Comptroller notified FNB Anchorage that its application for permission to establish a branch in the business district of Fairbanks had been approved.

Plaintiff First National Bank of Fairbanks, whose main banking office has been located in the Fairbanks business district for many years, filed the complaint herein on December 18, 1970. Plaintiff contends that in granting the branch charter to FNB Anchorage the Comptroller abused his discretion and acted arbitrarily, capriciously and unreasonably. Plaintiff bases his contention on the grounds

(1) that the Comptroller failed to consider Alaska bank branching law and policy, as required by the National Bank Act (12 U.S.C. §36), and (2) that the Comptroller violated plaintiff's administrative due process.

Plaintiff alleges that it will lose substantial banking business if FNB Anchorage is permitted to operate the proposed branch and has submitted the affidavit of its president in support thereof. The plaintiff has standing to maintain this suit. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970).

- I -

Plaintiff contends that the Comptroller must follow the binding and conclusive authority of both the Alaska statute and the interpretation of that statute by the State Banking Director that he would deny a state branch application in these same circumstances.

Congress has authorized the Comptroller of the Currency to approve the establishment and operation of branch offices by national banks "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." (12 U.S.C. §36(c)(2)). The Director of the Division of Banking and Securities of the State of Alaska is, in authorizing State banks to operate a branch, subject to the provisions of §06.05.415, Alaska Statutes, which provide in pertinent part that:

> "***The department shall issue a certificate of authority to operate a branch bank *** if (1) the department determines that the addition of the proposed facilities in the community is not detrimental to a sound banking system;
>
> * * *
>
> (3) the name is not deceptively similar to that of another bank in the proposed community or otherwise misleading;
>
> * * *"

It is evident from the foregoing that Congress sought to maintain competitive equality between State and national banks. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966). The Comptroller argues that he is bound only by restrictions on capital and location imposed by State law. It is noted that the Alaska statute contains no restriction on location. In light of *Walker Bank*, however, which held that all provisions of the branching law of the State involved were absorbed into 12 U.S.C. §36, that argument is no longer tenable.

At the Comptroller's public hearing in this case and in an affidavit filed with this Court, the State Banking Director has declared that based on his analysis of the general economic condition and the banking situation in the Fairbanks area, he would not now permit a State bank to open a new branch in Fairbanks and that he would not approve an application involving names so similar as "First National Bank of Anchorage" and "First National Bank of Fairbanks." Plaintiff suggests that the doctrine of

competitive equality as enunciated in *Walker Bank* requires that the Comptroller is bound by the official State policy as expressed by its Banking Director.

The authority of Congress to act in the field of national banking was settled in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In the National Bank Act Congress delegated to the Comptroller the authority to approve "oustide" branches of national banks, i.e. outside the city, town or village in which the main office is located if such banks could be established under the statute law of the state, 12 U.S.C. §36(c)(2).

In *Union Savings Bank of Patchoque v. Saxon*, 335 F.2d 718 (D.C. Cir. 1964) it was contended that because the Comptroller's interpretation of the New York branching statute accorded with the interpretations of that statute by the New York banking authorities it met the requirements of 12 U.S.C. §36(c). The Court held, however, that the clear and specific language of §36(c) absorbs legislative enactments of the State, not administrative interpretation of those enactments. The interpretive declarations of the State Banking Director regarding §06.05.415, Alaska Statutes, are not "statute law" which the Comptroller is required to follow in considering national bank branch applications under 12 U.S.C. §36(c)(2).

Where Congress has committed a wide area of discretion calling for expert judgment to an administrative agency, judicial review of that expertise is necessarily limited. *Securities and Exchange Commission v. New England Electric System*, 390 U.S. 207, 88 S.Ct. 916 (1968). The function of the court is not to conduct a hearing *de novo* on the evidence before the Comptroller but to determine whether or not there was some rational basis for the action taken. *Udall v. Washington, Virginia and Maryland Coach*

Co., Inc., 398 F.2d 765 (D.C. Cir. 1968), *cert denied*, 393 U.S. 1017 (1969). This is the standard for judicial review set by the Administrative Procedure Act.

An examination of the record discloses that, prior to granting his approval, the Comptroller had conducted a hearing at which several protestants expressed their views, conducted a field investigation and accumulated extensive documentation regarding economic and bankings conditions in Alaska and in the Fairbanks area. He considered the present and future banking needs of that city and the effects of the proposed branch on its banking community, including the possibility of loss of banking business to plaintiff and other competitor banks.

In *First Citizens Bank and Trust Company v. Camp*, 409 F.2d 1086 (4 Cir. 1969), involving approval of a branch where the State law required that the branch "meet the needs and promote the convenience of the community to be served" and that the "solvency" of the branch be assured, the Court first found that the Comptroller was bound by those requirements and then noted that neither the State statute nor any decided cases define those concepts or provide any specificity as to the factors which would show the presence or absence of "needs and convenience."

No Alaska statute or cases have been found which define what is meant by "a found banking system" or which suggest factors, proof of which would show that a proposed branch was or was not "detrimental to a sound banking system." In the absence of any binding State standard and because the Comptroller had sufficient evidence from which to determine whether or not the new branch would be detrimental to the soundness of Fairbanks' banking

system, his construction of that criterion cannot be upset. That he determined the new branch would not be detrimental to sound banking is implicit in his approval.

No precedents have been found under Alaska law for the "deceptive name" provision. The Comptroller, however, has preconditioned his approval of the branch charter on the use of a distinctive designation by that branch to eliminate any possibility of confusion arising from name similarity, FNB Anchorage has agreed and undertaken to stress the name "Interior City Branch" predominantly, in its advertisements and other public representations concerning this banking office. It is obvious that the Comptroller considered himself bound by, and did follow, the "deceptive name" restriction in the Alaska statute. His determination that the use of a distinctive designation would satisfy that restriction is not improper or an abuse of discretion.

- II -

As further grounds for requesting this Court to set aside the Comptroller's approval of the FNB Anchorage application, plaintiff claims that the Comptroller arbitrarily and capriciously violated its rights to administrative due process (1) in approving the branch for reasons not made public, (2) in acquiescing in the applicant's refusal to testify and submit to cross-examination at the hearing, and, (3) in failing to accord the proper weight to the application and supporting data in light of the Comptroller's rules governing the hearing, with respect to witnesses who fail to testify.

The clear weight of authority holds that the Comptroller in considering branch bank applications, is not subject to the hearing procedures found in the Administrative Procedure Act, 5 U.S.C. §§554-557, and that the same considerations

which led Congress to exempt him from the necessity of holding a formal adversary hearing also excuse him from filing written opinions expressing his reasons for approval or denial., *e.g., Sterling National Bank of Davie v. Camp,* 431 F.2d 514, 517 (5 Cir. 1970); *accord, National Bank of McKeesport v. Saxon,* 268 F.Supp. 720, 723 (D.C. Pa. W.D. 1967). There are no provisions in the National Bank Act branching section, 12 U.S.C. §36, requiring that the Comptroller either issue an opinion or make his reasons public.

Hearings conducted by the Comptroller have an investigative or fact-gathering, not a fact-finding purpose. *First Citizens Bank and Trust Company v. Camp, supra.*

The record discloses that at the hearing FNB Anchorage offered no oral testimony but rested on its application. Plaintiff and several other protestants, including the State Director of Banking and Securities, testified in opposition to the branch application. Plaintiff made no objection during the hearing to the refusal of FNB Anchorage to offer testimony or submit to cross-examination. Indeed plaintiff's president appeared at the hearing, which had been granted at the request of the protestants, without counsel.

There is no evidence in the record as to what weight the Comptroller accorded to the applicant's failure to offer testimony at the hearing. Plaintiff refers to the Comptroller's hearing procedures which provide in part:

> The refusal of a witness to submit to such questioning shall be considered by the Regional Administrator in determining the weight, if any, to be accorded that witness' testimony.

No objection was raised at the hearing to the applicant's reliance on previously submitted written testimony.

It does not follow from the approval of the application that the Comptroller accorded any weight or did not accord sufficient weight, to the fact that the applicant failed to offer oral testimony at the hearing. That failure to testify was only one of the factors included in the extensive quantum of evidence upon which the Comptroller based his approval.

After oral argument by counsel and careful examination of the entire administrative proceedings, the motions for summary judgment and the supporting points and authorities, the Court finds that the Comptroller's approval of the branch application is substantially and rationally supported and is neither arbitrary, capricious nor unreasonable. The Court further finds that the Comptroller did not violate plaintiff's administrative due process.

Accordingly, it is this 14th day of May, 1971,

ADJUDGED that defendant's and intervenor's motions for summary judgment be and they are hereby granted and plaintiff's motion for summary judgment is denied. Plaintiff's motion for a preliminary injunction to restrain the Comptroller from issuing a certificate authorizing operation of the branch pending a decision on the merits is hereby rendered moot.

This memorandum opinion will constitute findings of fact and conclusions of law. Counsel for the defendant will submit an appropriate order.

J. Lewis Smith, Jr.
United States District Judge

APPENDIX C

June 30, 1970

Mr. H. M. Blair
Vice President & Cashier
The First National Bank
of Anchorage
Post Office Box 720
Anchorage, Alaska 99501

Dear Mr. Blair:

This is to advise that the bank's application for a branch in the business district of downtown Fairbanks, Fairbanks, Alaska, has been processed by our staff.

After carefully reviewing and thoroughly studying all the material assembled and information developed relevant to the proposed branch, this Office has disapproved the branch application.

Very truly yours,

(Signed) J. T. Watson

Deputy Comptroller of the Currency

daj #13
***
disap. 6-26-70

APPENDIX D

[SEAL]
THE ADMINISTRATOR OF NATIONAL BANKS
WASHINGTON, D.C. 20220

November 10, 1970

Mr. D. H. Cuddy
President
The First National Bank of Anchorage
Anchorage, Alaska 99501

Dear Mr. Cuddy:

We have approved the bank's application to establish a branch in the Downtown Business District of Fairbanks, Alaska.

This approval is granted with the understanding that the branch will be opened within twelve months from this date. This approval shall automatically terminate at that time unless prior thereto the expiration date has been extended by the Regional Office. If this branch cannot be established within the time specified you should submit to your Regional Administrator of National Banks, sixty days before the expiration of this approval, a written application for an extension of time, setting forth in detail the factors causing the delay and justifying the requested extension.

Please advise this Office two weeks in advance of the definite date on which the branch will be established and furnish us with its exact address, including street number, and the popular name by which it will be known. The Comptroller's certificate authorizing its establishment will be issued when that information has been received. In no event should the branch be opened for business until you are informed that the necessary certificate of authority has been issued by the Comptroller.

Very truly yours,

(Signed) J. T. Watson

***

APPENDIX E

[Pages 48 and 49 of the Transcript of the Comptroller's public hearing held on March 31, 1970]

48 MR. POLKING: That's correct, and I think for that reason –

MR. WORK: I think precisely in the same way that we have had no opportunity to cross-examine or comment upon the writing and statements filed by the First National Bank of Anchorage which has not been available for cross examination.

MR. POLKING: You mean the most recent letters that have submitted?

MR. WORK: The most recent letters and the supporting economic date, we have never had an opportunity, as you know, to submit a written statement with respect to those. This was our statement and we expect further opportunity to examine these matters at this hearing.

MR. POLKING: Well, I believe that you have the opportunity at this hearing to present your arguments.

MR. WORK: Well, we are talking about, Mr. Polking, about the opportunity of cross examination.

MR. POLKING: Yes, I realize that. Well, as has been noted in our memorandum of procedures and as I noted at the outset of this hearing this morning, there is no requirement that one be available to answer questions on cross examination. He can refuse to answer and refuse to be present at all. So I believe that although it is unfortunate that your economist will not be able to be here to render testimony, I believe that we would not be able to incorporate any testimony that he gives.

MR. WORK: Certainly he will not give any testimony related to Fairbanks.

Let me ask one question to clarify this. I don't know whether Mr. Cuddy is or is not available for cross examination on his statement. If he is, I would like an opportunity.

MR. CREMO: The applicant has rested on its application. If it appears the thing to do on rebuttal, if rebuttal is permitted, Mr. Cuddy at that time would testify if it appeared in our judgment that it was necessary for him to do so, of course, he would be available for cross examination.

MR. POLKING: On the testimony he presents at that time.

MR. CREMO: Yes.

MR. POLKING: Do you have any further comments?

MR. WORK: No, sir.

MR. POLKING: We would like to take a short break at this time.

(A short recess was taken.)

MR. LEAF: We are ready to proceed.

Mr. Robertson.

Whereupon,

JOHN K. ROBERTSON

was called as a witness on behalf of the protestants and was examined and testified as follows:

DIRECT EXAMINATION

APPENDIX F

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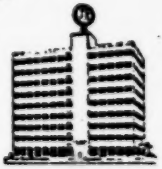

Borough Engineers

Up to 10 million gallons of sewage will be processed in this treatment plant to be built on Point Woronzoff by the Greater Anchorage Area Borough.

A Kodiak fisherman has found a way to make candles from seal carcasses. The results of Arthur Ziegler's process, which is being patented, are dripless, ivory-like candles which have a slight seal odor and will provide souvenir hunters with another "Made in Alaska" product.

When some one put me question for people I just don't know what to say. Like Walter Firth ask me could the kids talk Louchaaux. I said, I don't know. Even how long we talk English but still we talk Louchaaux. I don't know why the kids say they dont understand their own language. I couldn't understand that.
—Edith Josie, Old Crow correspondent
WHITEHORSE STAR

Dr. Dave Murray climbs lots of mountains, but never reaches the tops. A botanist, Dr. Murray sacrifices the glory of the climb for his science, which means he goes only as far up the mountain as the plants do. A University of Alaska associate professor of botany, he is also curator of the University's Herbarium, a department of the University Museum, which presently includes more than 42,000 specimens of Alaska's flowering plants.

In recent summers, Dr. Murray has explored the Yukon's St. Elias Mountains, previously untouched by botanists. This past summer he and his associates brought back more than 1,000 plant specimens which he will spend the winter cataloging.

Interested particularly in the arctic alpine tundra area to the north, and high elevations where trees don't grow, Dr. Murray seeks out plants in these remote areas and attempts to interpret their history. In his continuing hunt for Alaskan flora, Dr. Murray has swum with a pack train across the upper White River, hauled a sled singlehandedly down a Yukon glacier, and traveled by fixed wing-aircraft, helicopter and horseback. His future plans include a look at snow conditions and the effect they have on plants east of Barter Island.